IN THE

SUPREME COURT OF FLORIDA

MICHAEL GEORGE BRUNO, SR.,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 71,419
	)	
THE STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
	)	

SECOND AMENDED INITIAL BRIEF OF APPELLANT

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

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I. STATEMENT OF THE CASE

Michael Bruno, Sr. was indicted on one count of first degree murder and one count of armed robbery with a firearm. R 960. Defense counsel unsuccessfully filed a motion to suppress statements and physical evidence. R 1010-1016. R 4-119, R 1010-1016. A motion to sever counts I and II and/or motion to have the state elect between felony murder and premeditated murder was also denied. R 1040-1043.

Appellant unsuccessfully moved for judgment of acquittal at the end of the state's case. R 653-655. Appellant renewed that motion after resting. R 666. After two days the jury returned a guilty verdict on both counts. R 777-780. At sentencing, the jury entered a death verdict by a vote of eight to four. R 913.

Appellant timely filed motions for judgment of acquittal and/or in the alternative for a new trial, and to override the death recommendation and impose a sentence of life in prison R 1097-1101, but appellant was sentenced to death September 25, 1987. R 931-955, 1102-1103. A Petition for Rehearing of Defense Motion for Judgment of Acquittal and/or in the Alternative for New Trial was filed October 27, 1987, R 1114, and was denied. Timely Notice of Appeal was filed October 28, 1987. R 1115.

II. STATEMENT OF THE FACTS

A. Introduction

At the time of the offense, Mr. Bruno and his son, Michael Bruno, Jr., 15, were living at another family's home in North Lauderdale. Residing in the home were Arthur Mahue, the owner; Sharon Spalding, his fiance; Joseph Spalding, known as "Jody", (Ms. Spalding's son), and another Spalding child. The Mahue-Spalding family and their friends ultimately testified against Mr. Bruno at trial. Their testimony, together with Mr. Bruno's incriminating statement to the police, provided the core of evidence leading to Mr. Bruno's convictions for the first degree murder and armed robbery of Lionel Merlano.

B. The Motion to Suppress

Both Mr. Bruno and his son Michael Jr. were arrested on August 13, 1986, for the killing of Lionel Merlano.[1] They were taken to police headquarters for

[1] After statements implicating them were made by Sharon and Jody Spalding. These incriminating statements were a direct turnabout from previous information the two had given.

questioning, and both were held in custody in separate cells. Mr. Bruno was questioned first.[2] He had previously given an exculpatory statement to the police explaining his whereabouts at the time the killing occurred, R 50-51, and when confronted with new evidence against him, he told the police he did not want to make any further statements. R 34, 50-53.[3]. The police then began to question Michael, Jr., who ultimately implicated his father in the killing. R 53, 644.

Mr. Bruno had been returned to his holding cell and there spoke with Robert Manfre, a police lieutenant. Lt. Manfre testified that soon after returning to his cell, Mr. Bruno asked for a phone call, and called his parents. R 37. Appellant asked for a cigarette, then started to cry, saying he was worried about his son. Mr. Bruno questioned the officer about "certain facts" relating to the case. R 37, 38. Lt. Manfre said he had to stop the appellant, and told Mr. Bruno he didn't want him to make a statement to him. R 38. Mr. Bruno began asking Manfre for advice. Manfre told Bruno he felt it would be best if he told the truth, and if he wanted he could give a statement to Detective Edgerton. R 39.

According to Manfre, Mr. Bruno was concerned about what would happen to his son if he went to jail. He said that while the words "sexually molested" were never spoken, Mr. Bruno "may have been" referring to that. R 39-40. He told Bruno that only he could know what would happen to his son because only he knew the "total involvement" his son had in the killing, and only he had been in jail. R 39. Manfre denied telling Bruno that a statement by him clearing his son would mean his son would not go to jail, R 40, but that after Mr. Bruno indicated several times he wanted to make a statement, Manfre took him back to Detective Edgerton's office. R 43. At Edgerton's office for the second time that evening, Bruno gave a taped statement which was ultimately introduced at trial.[4] At trial, Edgerton admitted he had told Bruno that if he gave a statement under oath swearing his son was not involved in the killing then his son would not be

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[2] The time the questioning took place is in dispute, as shown below.

[3] Detective Edgerton, the lead investigator, testified he told Mr. Bruno that they thought his son was involved. R 51, 57.

[4] Bruno admits the killing but denies robbery was a motive, and says the killing was self-defense. First Supp. Record, V. I, pp. 1-17.

charged.[5] R 646.[6]

Meanwhile, Mr. Bruno's family had retained an attorney to represent him, and the attorney and his associate had contacted the police that evening in an effort to see Mr. Bruno, and had asked that any questioning be halted. Michael Castoro, an attorney practicing in Hollywood, Florida, was contacted by a friend of the family slightly after 9 p.m. R 9. The family told Castoro they wanted to retain him to represent Mr. Bruno and where Bruno was being held. R 7-8. Castoro called Edgerton around 9:50 p.m. R 9. Even though Castoro identified himself as Mr. Bruno's attorney and gave Edgerton his bar number, Edgerton refused to let him speak with Mr. Bruno. R 9, 15. Castoro testified he had caught the offficer before a statement was taken, as Edgerton seemed "very anxious to take one." R 9, 15. When Castoro directed him not to take a statement from his client, Edgerton "more or less shrugged it off." R 10. Castoro then called his associate, Kay Doderer, and told her to go to the police station. R 9.

Ms. Doderer, also an attorney, received the call from Mr. Castoro at about 9:40 p.m. directing her to go to the police station. R 17. She tried to call the police herself, but the line was busy. She arrived at the police station between "10 and 10:15 till 10:30." She immediately asked to speak to Detective Edgerton and to her client, Mr. Bruno. Edgerton refused the request, saying Mr. Bruno was giving a statement at the time and he was not going to let her in to see him. R 19. Ms. Doderer again advised Edgerton that Mr. Bruno was not going to make a statement. R 20. She was not allowed back to see Mr. Bruno. She gave Edgerton her card and was told she could talk to Bruno after they were finished

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[5] Edgerton did not make this admission at the suppression hearing. There he only said he made "no promises." R 63-4.

[6] Mr. Bruno testified at the evidentiary hearing on the motion to suppress the statements, and his recollection of the circumstances surrounding the questioning tracks much of what the officers say, but is somewhat different. He testified that when he and his son were arrested they were handcuffed together with wire ties, and while he as on the ground, one of the officers shot his gun not more than three feet from him. R 77. Mr. Bruno was brought to the police station, taken to a room and told that both he and his son were charged with first degree murder. After signing the rights waiver form, he said knew nothing he "didn't kill nobody," about it, and wanted to see a lawyer. R 80. After the call, Manfre came into the cell and had a cigarette with him. Manfre told him that if he made a statement his son would be released, and if he didn't, "well you know what they do with little boys in jail." R 82. Manfre suggested Bruno tell Edgerton that a fight broke out and that it was self defense, so Bruno gave a statement to that effect. R 83. Mr. Bruno also testified that no one told him a lawyer had been trying to contact him that evening. R 83-4.

with him. R 21. At 1 a.m. Edgerton called her back and said he had shown her card to Bruno, but he said he didn't know her. R 21-3. Finally, at 3 a.m. the next morning, she was allowed to speak with Mr. Bruno, R 23, 26, and she appeared on his behalf before the magistrate at 10:30 a.m. that day. R 24.

Detective Edgerton recalled the times differently but the events in approximately the same sequence. He testified he received a phone call from an "alleged attorney" at approximately 9 or 9:15 p.m. R 53, 69. When he "got out there" to talk to him, the attorney said he was retained to represent Mr. Bruno. Edgerton says no one is permitted to make calls at the station as a matter of policy; that Mr. Bruno had not requested them to call his parents and had not been given the opportunity to do so. R 54. (Edgerton did not know Mr. Bruno had been allowed to call his parents, though he says Manfre "may have" told him of the phone call.) R 55. The attorney asked Edgerton not to take a statement, but Edgerton refused, saying Bruno had not requested an attorney and to his knowledge had not made a phone call. Edgerton said he did not know who the person on the phone was, could not be assured it was an attorney, and could not follow what was being asked of him. R 55.

Edgerton said that when Ms. Doderer arrived at 10:30 p.m. he told her that she could not see him because Bruno had not requested an attorney, had signed a rights waiver form, and had made no phone calls to an attorney to his knowledge. R 59-60. He said he advised Mr. Bruno that Ms. Doderer was outside and wanted to see him, but that was after the statement had been taken. R 60.

There is a discrepancy as to when the incriminating statement was actually taken: at the end of the taped statement (Ex 2), Detective Edgerton says it is 10:10 p.m. At the beginning of the statement, Edgerton says it is 8:59 p.m. The tape is eleven minutes long. R 69-72. Edgerton says the tape "must have" ended at 9:10 p.m. R 71. This issue will be discussed in more detail, below.

The taped statement of Mr. Bruno was admitted into evidence and played for the jury. In it, Mr. Bruno says he alone committed the killing, but only after he and Merlano got into a physical battle when Merlano verbally abused his son.

C. Guilt Phase

1) lay testimony

The state sought to pinpoint the time of death by calling a person who

lived in the apartment next door to Merlano, but "barely knew" him. R 322. He testified that in the early morning hours of Saturday, August 9, 1986, he was awakened by noises coming from the victim's apartment. The sounds were like scuffling, and he heard (he "believes") Merlano saying, "hey, hey, hey" through the thin walls. The sounds lasted five or six minutes. R 327-8. The neighbor had initially thought the noises were "his friends having a little fun or something," not like anyone was crying out in pain. R 329. He got up and started to walk over to ask Merlano to keep it down, but the noise soon stopped so he went back to bed. R 327.

Michael Bruno, Jr.[7] gave a statement to the police the night they were arrested for first degree murder. R 436. He said under oath that on the evening in question, his father had taken him for a ride, dropped him off at a gas station, and came back an hour later. His father later told him he had gotten into a big fight with someone who might have been killed. R 437. That statement did not change until about ten months later, 2 days before trial was to begin.[8] On that day with the knowledge he was granted immunity, Mike, Jr. gave a dramatically different story to the state attorney and Detective Edgerton, in which he said he was an eyewitness to the killing. R 439, 647-9. By the time of trial, under immunity, R 101, 439, 722, Michael, Jr. testified that in the summer of 1986 he was down from New York, living with his father and sister Alicia at the Candlewood apartments. R 423-4. By August of 1986, the family was living with the Spaldings at their home. R 425. On Friday night, August 8th, several people were over at the Spalding house. R 426. At about 9 or 10 p.m., he and his father went to a friend's house at Candlewood apartments for some beers. R 425-6. One of the people at the Spaldings, Steve Mazella, loaned them his car. R 420. They both went to Building C, to an apartment unknown to Mike, Jr. R 427.

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[7] Michael, Jr.'s date of birth is June 5, 1971. He was fifteen at the time the crime occurred, sixteen when he testified. R 423.

[8] The trial was continued from that date. Second Supp. Record, V. II, pp. 13-15. During the previous ten month period, Michael, Jr., had been undergoing psychotherapy for "Acute Post-Traumatic Stress Disorder," with at least one psychologist, in Massachusetts. R 131. In an attachment to defense counsel's "Motion for Psychiatric Examination of State's Complaining Witness," are facts not discussed at trial: his psychiatrist relates that Michael, Jr., was suffering, among other things, "memory impairment," and "disassociative states in which he is unable to respond to the world around him." R. 128-131.

His father knocked on the door and the "guy" let them in. Mike, Jr. identified a picture of Merlano as the man who let them in. Only the three of them were in the apartment; they all drank a beer and listened to the man's stereo. R 426-8.

"At some point", Mike testified, his father went to the bathroom. Then "at some point" he went over to the stereo "to play with the knobs" R 429. His father told the man he liked the stereo equipment, and the next he knew "the guy was on his knees playing with the knobs, and my father was standing over him. He pulled out a crow-bar, started hitting him." The crow-bar had been in the front of Mr. Bruno's pants. According to Mike, Jr., his father used the crow-bar like a baseball bat, hitting the man "pretty hard" over the head a number of times. The man was bleeding, asking him to help, but Junior says he couldn't help because he was in shock. R 430.

The man fell to the floor and appeared to still be alive. His father told him to get a gun from under the sink in the bathroom, and he did. According to Mike, his father then grabbed a pillow, put it over the gun, and shot the man twice in the head. They both then left immediately. R 431-2. Mike testified that while he didn't have a watch, they had left for the man's apartment "in the neighborhood between 9 and 10 p.m.," that he was at the apartment for approximately an hour, and the incident happened at 10 or at the latest 11." R. 442.[9]

When they returned to the Spaldings, Mike spoke briefly with Jody, then went to sleep. R. 432. Mike testified his father later told him he had thrown the gun and crow-bar in a canal. R 432. He also testified that a picture of the apartment showing the area where the stereo had been revealed pieces missing; that his father made several trips over the next few days using Jody Spalding's car; and that a stereo "appeared" at the Spaldings' during that time. R 428, 432-3.

Mike, Jr. and his father moved out of the Spaldings' home shortly after, and had plans to return to New York at the time they were arrested. R 433. Since the arrest, Mike, Jr. said his father had told him to tell various stories either blaming Jody Spalding or another person; that he was out bowling or at the movies with a girl, or in a "roundabout way" that he and Jody Spalding had committed

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[9] Yet he also says they "could have" gotten back to Spaldings as late as 2 or 2:30 a.m. R. 443.

the crime. R 433-4.[10]

Other friends of Mike, Jr., and family and friends of the Spaldings also provided testimony at trial. The Spaldings' testimony, like Michael, Jr's., was entirely inconsistent with their initial statements to the police.

After Mr. Merlano's body was found in his apartment on August 11, 1986, an officer stopped Jody Spalding in the Candlewood Apartments parking lot. The officer said Spalding had been a "little defensive" and wanted to know why he was being asked questions. R 506.[11] The officer took his address and later questioned both him and his mother. R 508.

The officer came to the Spalding residence to question Jody and Sharon Spalding on Monday (the 11th), or Tuesday (the 12th). R 407. Jody admits that at that time he told the officers he knew "nothing about" the killing and that the Brunos had been with him the whole weekend. R 410. When Sharon Spalding was questioned that day, she also denied any knowledge of the killing. R 454-55.[12]

But in the days preceding the questioning, the Spaldings had possession of the stereo and T.V. belonging to Merlano, and were using both in their home. R 411, 455, 456. Jody Spalding had thrown away a pair of his sneakers later determined to have blood on them. R 415-416. By the time the police came back on Thursday to question Sharon Spalding again, she had put the stereo equipment in the trunk of her car. R 453. When she was questioned the second time, the police officers told her they knew she was holding back. R 455. It was then that she showed the officers the stereo components that were in her trunk, R 453, and told the police the story she testified to at trial.

Ms. Spalding testified that the last week in July 1986 Mr. Bruno mentioned a man in "C" building and "what he was going to do to him" R 449: "He told me that he was in Viet Nam with this man, and because of this man's stupidity, eight or nine of his friends got killed, and that he was going to get even with him."

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[10] Michael, Jr., also testified this friend, Jody Spalding, sells marijuana "but not cocaine." R.435-6.

[11] Spalding says he and Mike, Jr., were in the car, and "thinks" he told the police he was there to pick up a receipt for a refrigerator. R 407.

[12] Sharon Spalding had "visited" Candlewood Apartments, and cleaned apartments there in the past. She had access to keys to all the apartments ("the ones that were empty") and knew where the keys were kept. R 462.

R 450. She recalled that on Friday, August 8, she saw Mr. Bruno sitting on a couch in her house with a gun in a brown suitcase. She told him she didn't want a gun in her house, and he said he was taking it out of there. R 450. By the next day, "certain items" had appeared in the utility room: a computer, VCR, and some stereo equipment. R 451. When asked about the items, Bruno told her not to worry, that the person wouldn't be coming for them because he was dead. R 452. She didn't tell the police about it immediately because she either didn't believe him or was scared Bruno "might do something to her family." R 452, 458.

Jody changed his story the same day his mother did. He "believes" the police questioning centered on the stereo equipment. R 410. He told police Mr. Bruno committed the killing, and he retrieved his sneakers for the police from a dumpster where he had thrown them away. R 416. The story he ultimately told that day is the one he also testified to at trial.

Jody was eighteen at time of trial. R 387. He knew Mr. Bruno and his son, Mike, Jr., and daughter. R 388. About a week before the incident, Jody says, he and Mr. Bruno went to see a friend of his, Chris Tague. R 388. Mr. Tague had a gun, and Mr. Bruno asked if he could borrow it. R 388-90.[13]

Jody says that Mike, Jr. got back at 2 or 3 a.m. the morning of August 9th but didn't say anything at first. He looked "pale and weak and scared, really scared". When they were alone, Mike, Jr. said "you don't ever want to see what I saw tonight." R 391. Jody says he later saw Bruno, who told him he had gotten into a "big fight with this guy and he was dead". R 391. Bruno said "he was going to get some equipment and stuff from the guy's house," R 391, and left in his mother's car. Jody went to sleep. R 392. He was awakened at 10:00 a.m. on Saturday by Bruno, who said he wanted Jody to take him to Casa Sorreno, where his parents were living. R 392. When he awoke, Jody saw for the first time a VCR and stereo equipment in the house. R 393. Bruno told him he got the stereo from the house of a guy that he killed. He says Bruno looked "scared very nervous". R 393.

Jody took Bruno to the complex, and when they got there, he says Bruno

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[13] While Jody Spalding denied dealing marijuana, he admitted that he and a friend had previously gone to "collect money" from a man named "Duke," who owed "Archie" (Maheu) money. He didn't know for what, and was "not sure" if anyone who went with him to collect money had a gun. R 415, 420.

threw "something" away, "what looked to be a steel bar wrapped in cloth." R 354. On the way home, he asked Jody to stop at another canal, where he threw a gun wrapped in a cloth. R 395. Then they stopped at yet another canal, where he threw away the cylinder piece of a gun. R 395-6.

The next day, Bruno had a Commodore Computer. R 396. That morning, Jody, Bruno, and Chris Tague went to the airport to drop off his brother. R 397. Bruno then "insisted" on going to C Building at Candlewood "where the guy was supposed to be dead." R 398. Bruno "said he was worried about some fingerprints that might have been left behind, and he had to get back in." R 398. He went to the apartment with Bruno because "you never know what he might do to us." R 398.

At C building, the three of them went to a door "where a girl supposedly lives, Kim", and Bruno tried to open it with a screwdriver. Bruno couldn't get in, so they went to E Building to borrow a butter knife. They still couldn't get in so they left. R 400-02. On Tuesday or Wednesday Bruno and Mike, Jr. left the house. Spalding says he got a call from Bruno telling him to get rid of his shoes, because they had been used in a "murder." R 402-03. So he put the shoes in a paper bag and threw them away. R 463.

Other friends of the Spaldings testified. Steven Mazella, one of the many people who stopped in at the Spaldings that evening, is eighteen years old. R 466. On Friday evening he and his girlfriend arrived about 7:30 or 8 o'clock p.m.[14] Jody wasn't there, but Bruno and his son were. R 467-8. Mazella and Bruno discussed Mazella's car. A month or so previously, Bruno had wanted to use the car to "borrow a bunch of stereo equipment from a friend." R 489. He asked to borrow the car again that evening to get some stereo equipment. R 470. His son was with him. The next time he saw Mr. Bruno was about 1:00 or 1:30 am. R 471. When he returned, Bruno put the car keys on the table, and said nothing out of the ordinary. Mazella asked Bruno where the stereo equipment was, and Bruno told him his plans had fallen through. R 470-7. That was it for the night.[15]

The rest of the entourage from the Spalding party also testified. William

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[14] Mazella had also gone with Jody Spalding and others to "collect" money from "Duke." He said he didn't know why the money was owed. R 476.

[15] Mazella's testimony jibed with the Spalding story. Bruno told him to fix the blame on someone else when he visited him later at the jail, and confessed to him, saying "of course, you did know that I did do it." R 372-3.

Tillman worked with Jody Spalding that evening, and went home with him (along with two others) at 1:30-1:45 a.m. R 481-3. He saw the Brunos come in about 1:45-2 a.m., and Michael, Jr. looked shocked R 487. They all stayed the night. After having his "recollection refreshed" by the prosecutor, Tillman said he saw Bruno in the early morning in the hallway, wearing a black sweater, jeans and sneakers. On the lower part of the leg and around his shoes, Tillman says he saw "little specks of blood." R 486. Tillman also went to Candlewood with Bruno on Monday but described the incident as knocking on a friend's door, then leaving. R 486.[16]

Another person questioned by police at the scene later changed her account of the evening of Friday, August 8th. Diane Liu lived at Candlewood apartments during the relevant time, and "works on shoes and purses at the Goodwill." R 374-5. She saw both Bruno and Merlano at a Candlewood party that night. Merlano was there about 8 drinking beer. R 376-8. She saw Bruno alone around 8. R 377. When first interviewed by the police, she said nothing about an incriminating statement by Bruno. R 377. But she testified at trial that Bruno had asked her to go to another party: "It's a murder party. It's going to be a great killing." R 378. Ms. Liu also said she "just always know that Mike was always joking. You couldn't never took him serious at that time." R 382.[17]

Arthur Mahue, Sharon Spalding's husband, came forward some six months after the killing with his story. He also found the stereo equipment in his house. He says he asked Bruno where it came from and Bruno tried to sell it to him. According to him, Bruno said "they just came from this house where he had killed this guy and he ransacked it." Bruno sent his son in first to give him an alibi to come looking for his son. Then Bruno stepped in and had a few beers with him. "When this guy got up to empty the ashtray, he pulled the bar out from his pants, he said, and started hitting him on the back of the head. He said the

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[16] Ed Paul testified he worked that night with Jody, and went home with him, only he says they left the Red Lobster at 12:20 a.m. R 597-602. He left the Spalding house about 2:00 or 2:30 a.m. with Steve Mazella. R 602.

[17] Ms. Liu also testified that she saw Bruno at Candlewood the next morning, walking around "making his rounds. He always says hello to everybody." She also saw him later that day working on his Camaro, sometime between 5 and 7 p.m. R 380. She also saw him on Sunday, and Monday morning about 8 a.m. sitting on his car, talking with his son. R 380-381.

guy fell to the ground and he was still alive, and he shot him with a pillow muffling." R 507-8. Some time prior to this he mentioned that there was somebody in C Building "that he knew that he recognized .... [and was going to get even] for what he did to his buddies in Viet Nam." R 568-9.

2) scientific evidence

Physical evidence and the testimony of experts was also introduced at trial. Pat Hanstein, the first detective on the scene, testified that when he entered the apartment it was relatively neat and clean. R 494. There was a pillow over the head of the deceased, R 494, which had holes in it, and hair and blood. R 487. The officer noted the entertainment center seemed to be missing equipment: several jacks were not connected, and there were clean spots surrounded by dust rings. R 497. While no narcotics were found at the scene, the officer did find "narcotic paraphernalia" in Merlano's apartment. R 514. He could not tell whether the apartment had been broken into, and none of the keys found in the apartment fit the lock on the door. R 517. Several latent prints were lifted from the apartment, but none matched Bruno's. R 514. Hair samples from under the deceased's fingernails did not match Mr. Bruno's, R 515, and turned out to be the hair of the deceased. R 523.

Hanstein took part in the search for the gun and crowbar. Gun pieces were found near where Mr. Bruno had told them to look. R 503. Three different canals were ultimately searched. He was there when the gun was found. R 503. Hanstein also recovered the sneakers from Jody Spalding that Mr. Bruno was supposed to have been wearing at the time of the crime. R 503. Sgt. Beck recovered the gun casing in one of the canals, R 558, with the help of Jody Spalding.

From the bullets recovered from the body of the deceased, R 553-5, a comparison was made with the gun by Patrick Garland, the Broward County Sheriff's Office firearm examiner. R 576. He concluded one of the bullets was fired from the gun that was recovered. R 579. The other fragments were too small for a comparison. He found gunshot residue on the bottom of the pillow found at the scene, which is associated with the contact discharge of a firearm. R 583.

A serologist testified there was blood on the sneakers that other witnesses said Mr. Bruno was wearing at the time of the crime. R 592. There was not enough blood on the sneakers to discriminate other characteristics, even whether it was

animal or human, R 592, 595, or how long it had been there. The hairs on the deceased's hand were attributable to him, not Mr. Bruno. R 596.

Dr. Ongley, the Medical Examiner, testified that the cause of death was multiple head injuries and two gunshot wounds to the head. R 531. Injuries to the deceased included a laceration of the lip extending to the underlying teeth, which were fractured, either because the deceased was hit or fell face down. R 533. There were injuries to the back and shoulders over the right upper back angling across the shoulders. Two "pattern contusions" were on the back where it was struck with a blunt instrument. R 534. On the scalp there was a series of lacerations on a line behind the ears ranging in size from 1 1/8 to 1 1/4 inches which went through the scalp to the skull. R 534. The injuries were caused by "blunt impact". There were a variety of skull fractures, and bleeding around the brain associated with both the blunt impact and gunshot injuries. R 535. The injuries were "consistent with" infliction by a crow bar or tire iron. R 535. The blunt impact injuries were inflicted before death occurred, and those injuries themselves would have resulted in death within a period of hours. R 535-6. Both gunshot wounds were also fatal -- the deceased would have become immediately unconscious and died within a short time R 536. The gunshots "must have been" inflicted while the deceased was still alive. R 537. There were also injuries on the palm of the right hand, and to the middle fingers, caused by a sharp edge. R 537.

Dr. Ongley put the approximate time of death as 24 to 36 hours before he examined the body on August 11th, at 4:00 p.m. R 542. He could not say whether the hand wounds were defensive in origin. R 544-45; 548. Dr. Ongley also found that at the time of death the deceased had a blood alcohol level of .16 which meant the person had consumed approximately eight ounces of alcohol. R 547-8.

D. **Penalty Phase**

Denying a defense motion to continue, R 946, the Court started the penalty phase the day after Mr. Bruno's conviction. The state put on no additional witnesses, but began the penalty proceeding by reading to the jury a stipulation that Mr. Bruno had previously been found guilty of possession of cocaine and

marijuana.[18] R 785.

The first witness for the defense was Elizabeth Frances Bruno, the defendant's mother. Though Mrs. Bruno was married, she had to raise her three children by herself. Her husband, who had fought in two wars, had been disabled and spent most of the childrens' youth in a VA hospital. R 787. The defendant was "as happy as I could make him being the mother and the father both." R 787. When Mr. Bruno was young he was peace-loving, "always happy-go-lucky." He played baseball, and was in the Boy Scouts. His mother had him take guitar and music lessons. R 791. Mrs. Bruno "was very strict with the three [children]," R 791, and "Michael was a good boy when he was home. [She] wouldn't let him get away with anything." R 790. After he left home and got married fresh out of high school, Michael changed. R 788-9. He let his hair grow, got into a band and "motorcycle group." R 788. He "started running wild, here and there." But things got worse: "he started getting tattooed a lot, and I told him I didn't like it. I even threatened to cut his arm off if I found any more on him." R 789.

The real breaking point came when Bruno's wife left him. He went "berserk".[19] Friends of Michael told his mom that he had been using drugs, but when confronted by her, he denied it. Then there was the suicide attempt:

> He got very depressive, and he tried to drown himself at one point and it didn't work. And I understood he took an overdose, and my daughter took him to the hospital and had him admitted. But then somehow, I don't know, he got out again and I held that against my daughter thinking that she had taken him out.

R 790. Before his arrest on the murder charge, Michael told his parents that he did have a drug problem. He promised to get off, but his mother told him he had always been on drugs and would never get off. R 790.

Mr. Bruno's father testified to the same change in behavior his mother had From his wheelchair, he told the jury about his disability caused by a rare disease, "tis doloreuax." R 795. Because of his problems, George Bruno was in

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[18] The defense sought to argue lack of a significant criminal history. R 783.

[19] Mrs. Bruno says at that time her son "just didn't care, have any desire to live, to go on living, because his love for his children was very great, very strong, and he didn't want to lose his children. He loved his wife very much but I tried to make her understand you cannot hold a man by letting him have his way all the time. There comes a time when you have to put your foot down." R 789.

and out of the hospital almost all the time, requiring frequent "head operations." R 795. He helped raise the children "as best he could", but was not home often. When Michael was growing up, he played sports, took guitar, and was in the Boy Scouts, R 797, "he was a good boy," and there weren't any problems. R 795. Michael's father noticed a great change after he left home and got married. He had "tattoos, weird haircuts, started losing weight like he was getting very skinny." R 796. He attempted suicide and was taken to a hospital. R 796. He was always tired, always lying down. R 799. After the divorce he also noticed a great change in his son's behavior. He came to the house with "weird haircuts" and "wasn't the same kid no more." R 798.

A psychiatrist who had examined Mr. Bruno gave his impressions and diagnosis. The psychiatrist, Dr. Arthur Stillman, had twice examined Mike Bruno, researched his drug history, read letters from and spoke with Ms. Gruninger (a nurse at the jail) and spoke with Bruno's sister. R 802-805. He has been in medicine since 1944, and a psychiatrist since 1957. R 832. He was qualified as an expert. R 789. Dr. Stillman concluded that at his best Bruno had a passive-aggressive personality disorder, and when he was at his worst, under the influence of drugs, he suffered from a schizophreniform disorder, that is, suffered schizophrenic-like symptoms. R 803. Bruno told him, and tried to convince him, that he was not crazy. R 804. Dr. Stillman related an extensive history of use of hard drugs, including L.S.D. and cocaine, R 805, and his severe and chronic depression when his wife left, leading to his suicide attempt. R 806. There had been permanent "critical damage" to Bruno's brain because of his drug abuse, though it was difficult to detect because it was not diffuse. R 809, 818. In part because Bruno had been using large quantities of cocaine daily for the three weeks preceding the killing, Dr. Stillman concluded Bruno was <u>not</u> <u>sane</u> at the time of the killing. R 821. Dr. Stillman also testified Mr. Bruno would not be a danger if he refrained from drugs. R 834-5.[20]

Mr. Bruno testified on his own behalf. R 836. He was married at eighteen

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[20] The State's cross focused on Mr. Bruno's tattoos, which had been mentioned on direct, suggesting they didn't represent confusion, but rather "evil." R 820. The prosecutor also brought out the underlying facts of prior crimes, supposedly to explore Mr. Bruno's mental state at the time of those crimes, R 825-6, and concluded with a personal attack on Dr. Stillman, asking if it wasn't true he had failed his own test of naming presidents in reverse order in a previous unrelated trial. R 831-3.

years of age. R 837. He and his family lived in Sweden for a year. R 837. In the midst of his divorce, he was snorting cocaine until she left, at which time he began to smoke cocaine. R 838. He was arrested for buying cocaine from a policeman during that time. R 838.

He moved into Candlewood Square Apartments with the Spaldings, whom he knew from buying cocaine from Sharon Spalding. R 839. He had seen Jody Spalding use the murder weapon to collect drug debts. R 842-843. Through the Spaldings, Mr. Bruno began selling cocaine, and had sold some to Merlano, who eventually incurred a debt to Mr. Bruno. R 843. He got the weapon from Jody Spalding's house to protect himself, taking his son to prevent a confrontation with Merlano. R 844. Bruno had no plan to kill Merlano and did not take the stereo equipment. R 844. Merlano resisted paying the debts and a fist fight ensued. R 845. Mr. Bruno yelled for his son to get the gun and a shot went off. R 845. He denied having a crowbar R 845, admitting he did hit Merlano with the gun. Mr. Bruno returned with his son to the Spalding's. R 845. He spoke to Archie (Arthur Maheu) telling him what had happened. R 645. Maheu went to Merlano's apartment to see if he was still alive and took the stereo equipment, justifying the theft because Mr. Bruno owed the cocaine money to Sharon Spalding Maheu. R 845. Mr. Bruno went to sleep, awaking the next morning and finding the equipment. R 846. Afterward they drove to the canal, and Spalding disposed of the gun. R 846.

Mr. Bruno testified that he was using drugs during that period of time R 847, and was freebasing cocaine before the killing. R 880. Merlano was drinking at the time Mr. Bruno arrived. R 848. Mr. Bruno insisted that though he fought with Merlano and was sorry about his death, he did not pull the trigger. R 848.[21]

After lunch recess taken in the midst of the state's cross of Bruno,

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[21] The prosecutor began his cross of Mr. Bruno by asking him why he had a "swastika" tattoo, and if it was "Nazi good luck sign." R 848. During the cross examination the prosecutor also asked who all the witnesses were on the defense witness list. R 872. Later the prosecutor referred to prior proceedings during which the trial court ordered Mr. Bruno to give a handwriting sample, and implied that he refused. R 873.

On redirect, Mr. Bruno testified that upon his arrest, he and his son were thrown to the ground. R 875. Soon he heard a shot go off; he thought it had been fired at his son. R 875. After being taken to the North Lauderdale station, Mr. Bruno refused to change his story from that which he had told the police earlier. R 876. After Manfre mentioned that little boys get raped in jail, Mr. Bruno changed his mind about giving a statement. R 877. He was brought back to the questioning room and he changed his statement. R 877.

defense counsel asked for a sidebar. With the prosecutor (but apparently not the defendant) present, defense counsel contradicted the testimony of the single mental health expert testifying for the defendant. Defense counsel told the judge that Dr. Stillman had never before told him Mr. Bruno was insane, either orally or in two confidential reports. R 864-6.

The cross-examination continued, as summarized above, and closing argument began, with the Court telling the jury that the attorneys "now have an opportunity to speak with you with regard to their feelings about what it is I should do." R 884. After closing argument, the Court instructed the jury they were to "advise the Court" which had the "final say" on the sentence. R 907. He then listed, by number, the aggravating and mitigating circumstances, and the jury eventually returned a death recommendation by an 8-4 vote.

After the judge, jury and defendant were out of the courtroom, counsel took the prosecutor to the Court reporter and again made his position on Dr. Stillman's testimony clear "for the record." He said, again, that the defense psychiatrist had never before told him Mr. Bruno was insane, and to "make it abundantly clear that it was not oversight on the part of defense counsel to explore or give reason to explore the defense of insanity." R 918.

In sentencing Mr. Bruno to death, the Court indicated it had considered the PSI and "letters from Ms. Gruninger." R 931. He indicated he could only sentence Mr. Bruno to life if "no reasonable person could differ" with the jury's death recommendation. R 957. He found six aggravating factors: (1) prior violent felony (based on the robbery); (2) felony murder (same); (3) avoid arrest; (4) pecuniary gain; (5) the crime was heinous, atrocious or cruel; and (6) cold, calculated or premeditated. R 1105-06. Three of those factors the trial court merged and considered as one. R 1107. The Court found no mitigation. On the defense mental health testimony, the Court specifically rejected as a "factual finding" the testimony of Dr. Stillman. R 1107.

III. SUMMARY OF THE ARGUMENT

A. The Guilt Phase Claims

1. The police extracted an involuntary confession by using a deceitful and coercive ploy playing on Mr. Bruno's fear his son would be sexually assaulted in jail by promising to release him if Bruno gave a statement saying his son was

not involved. This artifice also abrogated Mr. Bruno's waiver of his right to remain silent. Also, the custodial questioning occurred after Mr. Bruno's attorney independently demanded questioning cease, or no questioning take place at all. Finally, the trial court failed to make an adequate factual finding on these issues, relegating resolution of the "disputed facts" to the jury.

2. Property was taken, but not until well after Lionel Merlano was already dead. There is no sound evidence of intent to rob.

3. There are three theories urged here for reversal. First, because the evidence of robbery is insufficient, and the jury was instructed on alternative theories, returning a general verdict, the reviewing court cannot lawfully conclude it was based on premeditated murder. Second, the jury was not instructed its finding of guilt on Count I had to be unanimous on any one of the theories. Third, because the taking of property occurred at a time far removed from when the killing took place, it is unlawful to transfer intent from the underlying robbery to first degree murder.

4. The Constitution and Florida law require a complete record on appeal. There is no record of bench conferences during voir dire. Because counsel for Mr. Bruno exhausted his ten peremptories, but there is no record, and some jurors were eligible for defense cause challenges, Mr. Bruno is deprived of his right to raise a partial jury claim on appeal.

5. Denying defense counsel's motion for grand jury testimony, or for in camera inspection, deprived Mr. Bruno of a fair trial where witnesses had in fact given prior inconsistent statements.

6. Count I of the indictment alleges only premeditated murder, yet the prosecution pursued alternative theories at trial, violating the Constitution.

7. Where counsel provided a proffer of Bruno, Jr's, substantial emotional disorders affecting his competency to testify, the trial court's refusal to permit psychiatric examination was unlawful.

8. Several witnesses were unlawfully permitted to testify to their fear of Mr. Bruno, where there was no evidence of threats.

9. Unlawful testimony implying Mr. Bruno was considered dangerous and guilty because he was held in jail before trial violated the Constitution and Florida law.

10. Defense counsel brought to the trial court's attention the fact that his client wanted to put on witnesses during the guilt phase. Both he and the trial judge explained the (unlawful) rule forfeiting the "sandwich" at closing by doing so, but Mr. Bruno never waived his right to present a defense.

11. The prosecutor's repeated expression of personal opinion, reference to non-record evidence, and suggestions to the jury their function of determining guilt or innocence had already been accomplished by other agencies of the State of Florida deprived Mr. Bruno of a fair trial.

12. The "short form" of the jury instructions on justifiable homicide misled the jury and misstated the law on the burden of proof where self-defense is in issue, omitted defense of others as a basis for justifiable homicide, and diluted the opportunity to return a verdict on lesser charges, and were thus fundamental error. Justifiable homicide was fairly raised by the introduction of Mr. Bruno's statement in the prosecution's case-in-chief.

13. Mr. Bruno was involuntarily and unknowingly absent at arraignment, motion to continue, and during a colloquy between the Court and counsel regarding the appropriate response to jury questions. Without record waiver, the convictions must be reversed.

14. The trial court suggested a procedure, to which counsel but not Mr. Bruno agreed, by which the bailiff would provide the jury with evidence if they so requested. The record indicates such an exchange took place outside the presence of the judge, counsel and Mr. Bruno, depriving him of a fair trial.

15. After the jury had been out approximately 26 hours, the Court brought them into the courtroom and asked if there was "some problem." There was no objection, but the law requires prior consultation and forbids sua sponte coercion in returning a verdict.

B. The Penalty Phase Claims

1.a. Mr. Bruno challenges as improper the findings as to all six aggravating circumstances. The prior violent felony is the robbery of the deceased in this case, which is improper as a matter of law. The felony-murder aggravator is the robbery, of which the evidence is insufficient. Avoid arrest was found by the trial court without record support of that intent. The finding of pecuniary gain must fall, because there is no evidence the killing was for

such a purpose. Heinous, atrocious or cruel must be reversed, because the trial court improperly relied on the effect of the killing on others, and substituted its opinion that there were defensive wounds for that of the state's expert. It is improper as a matter of law for numerous other reasons, including Mr. Bruno's mental illness and the deceased's drunken state at the time of the killing. Cold, calculated does not apply because of Mr. Bruno's impaired mental state at the time of the killing, the lack of evidence of "heightened" premeditation, and the pretense of justification, i.e., a dispute.

1.b. Assuming pecuniary gain applies, there was unlawful doubling because this circumstance was considered as a separate aggravator when robbery and robbery-murder were also found.

1.c. Announcing its decision to impose death, the trial court said it could only impose life if no reasonable person could differ with the jury's death recommendation. While a jury recommendation of death is entitled to great weight, the higher standard applied by the trial court is unlawful and skewed the weighing process.

1.d. Considering extra-record letters from a non testifying party in imposing death and failure to include them in the record violates due process and the eighth amendment.

1.e. Specifically considering the Pre-Sentence Investigation Report, which included non-record evidence referring to depositions, police reports, and comments of police officers and the victim's family, together with the Department of Corrections officer's recitation of unlawful bases for imposing death, such as lack of remorse, violates due process and the eighth amendment.

1.f. Lack of any significant discussion of mitigation in the sentencing order indicates the trial court failed to give it adequate consideration in the death-sentencing decision, contrary to the eighth amendment and Section 921.141, Fla. Stat. (1986).

1.g. Rejecting as a "factual finding" the mental health expert's testimony violated the Constitution and Section 921.141, Fla. Stat. (1986) because it was unrebutted, and except for defense counsel's unsworn assertions undermining the testimony it would have compelled a finding in mitigation.

2. In this case death was recommended by a jury which thought the judge

was solely responsible, and imposed by a judge who thought the jury was mostly responsible. In its contemplation of the appropriate sentence, the jury was urged by the prosecutor to consider nonstatutory aggravation, and to consider mitigation such as Mr. Bruno's character, in aggravation. The prosecutor highlighted inflammatory evidence that Mr. Bruno had a "swastika" tattoo, and unlawfully questioned the propriety of mental mitigating factors, among other errors. The cumulative effect of its presentation to the jury so undermines the legality of the proceedings that a new penalty phase is required.

3. Where the trial court does not find mitigation, this Court's role does not preclude inquiry into its existence. The mitigating evidence here was unrebutted, and included evidence of mental illness, intoxication at the time of the crime, stress, a difficult childhood, youthful participation in sports and organizations, and other evidence. Also relevant is the lenient treatment of other participants, who were not charged at all.

4. Because some or all of the aggravators are unlawful, and there is substantial evidence in mitigation significantly lessening Mr. Bruno's culpability for the killing, including mental illness and intoxication and the deceased's drunken state, together with other circumstances of the offense, death is not proportionate.

5. In light of recent developments in the United States Supreme Court and Courts of Appeal, this Court should revisit the constitutionality of Florida's capital sentencing statute. The heinous, atrocious or cruel and cold, calculated aggravators have been applied in an arbitrary manner and are incapable of constitutional application. The evidentiary standard for mitigation and the death presumption unlawfully limit consideration of mitigation.

C. The Robbery Sentence.

There is no guideline scoresheet in the record, and a remand produced none. The life sentence on Count II, robbery, must therefore be vacated.

IV. ARGUMENT

A. The Guilt Phase Claims

1. MR. BRUNO'S CONFESSION WAS UNLAWFULLY OBTAINED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 17, FLORIDA CONSTITUTION, AND SHOULD HAVE BEEN SUPPRESSED ALONG WITH EVIDENTIARY FRUITS.

a. Bruno's custodial statement was involuntary: the trial court erred in denying the Motion to Suppress

After refusing to give a statement, R 33-4, 48-51, Mr. Bruno spoke with Lt. Robert B. Manfre, of the North Lauderdale Police Department. Mr. Bruno indicated to him that he was worried about his son, and started crying. R 38. Manfre says he didn't want to ask him any questions but told Bruno

> that I felt it was the best thing for him to tell the truth, and if he wanted, to give a statement to Detective Edgerton concerning what he did in relationship to this case.

R 38-9.

Lt. Manfre admits Mr. Bruno was concerned about what would happen to his 15 year old son if he went to jail. R 39. This is what Manfre testified he said in response to those fears:

> I believe I indicated to him that only he would know what would happen to his son because he would know what the total involvement of his son was in the case, and that he was in jail. He would better know what would happen to his son than I would since I have not been in jail.

R 40.

Manfre says Mr. Bruno "may have been inferring" he was concerned his son would be sexually molested in jail, but "those words ... was [sic] never spoken." R 40. Manfre says he never told Bruno that if he gave a statement clearing his son he would not go to jail. It was after this discussion that Mr. Bruno gave his statement (exculpating his son) to Detective Edgerton.

Detective Edgerton testified about the circumstances surrounding the taking of the statement. Edgerton admitted he told Bruno they did <u>not</u> have evidence, but that they believed his son was involved. R 50-51. They discussed his son being in custody and did indicate his son would go to jail if he was involved. R 57. Mr. Bruno then went to his cell. When Manfre came back, Mr. Bruno wanted to make a statement "indicating that his son was not involved." R 59. During the suppression hearing, Edgerton maintained he "never misled" Mr. Bruno about anything concerning his son, and that neither he nor any other officer made any promise to get him to make a statement. R 63.

After the motion to suppress was denied, and Detective Edgerton was called as a trial witness, his memory of his conversation with Mr. Bruno changed in a significant way: he admitted he had told Mr. Bruno his son would not ever be charged if he gave a statement saying he had nothing to do with the crime:

> I indicated to the defendant that if he, in fact, gave a statement and in his statement under oath he swore that his son was not involved that his son would not be charged.

R 646.

The law requires suppression of statements "obtained by 'techniques and methods offensive to due process' Haynes v. Washington, 373 U.S. 503, 515 (1963), or under circumstances in which the suspect clearly had no opportunity to exercise 'a free and unconstrained will,' Id. at 514." Oregon v. Elstad, 105 S.Ct. 1285 (1985); see Colorado v. Connelly, 107 S.Ct. 519 (1986). "Whether a [c]onfession was obtained by coercion or improper inducement can be determined only by an examination of all the attendant circumstances." Columbe v. Connecticut, 367 U.S. 508, 513 (1961); accord, Frazier v. Cupp, 394 U.S. 731 (1969). The prosecution bears the burden of proving a statement's voluntariness by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477 (1972). The standard against which this Court must review the confession's voluntariness is that it "must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence..." Bram v. United States, 168 U.S. 532, 542-43 (1897). Accord, Brewer v. State, 386 So.2d 232 (Fla. 1980).

Detective Edgerton's belated but surprising admission that he told Bruno he would release his son if he gave a statement exculpating him unquestionably renders the confession and its fruits inadmissible under the Due Process Clause. Williams v. State, 441 So.2d 653 (Fla. 3d DCA 1983); Hawthorne v. State, 377 So.2d 780 (Fla. 1st DCA 1979) (promise to release defendant's children from further questioning); Jarriel v. State, 317 So.2d 141 (Fla. 4th DCA 1975) (promise that wife would not be arrested if defendant confessed); Ware v. State, 307 So.2d 255, 256 (Fla. 4th DCA 1975) (confession suppressed where police "softened him up with a wily approach involving [the defendant's] family."). See also Williams v. State, 22 So.2d 821 (Fla. 1945) (murder conviction reversed and confession suppressed where the direct cause of defendant's confession was the police bringing his mother to the station and detaining her in cell), and Lynamm v. Illinois, 372 U.S. 532, 534 (1963) (threat to cut off financial aid and take away children had "impellingly coercive

effect" on defendant; confession suppressed as involuntary).[22]

Other circumstances contributed to the coercion. Mr. Bruno, all agree, made his feelings known that he was concerned his 15 year old son would be sexually molested while in jail. Manfre did nothing to disabuse him of those concerns; he played on them and fanned them, with his coy "you would know better than I" response. There is one inescapable conclusion: the police were holding Mr. Bruno's son illegally, and they knew it, as a ploy to get him to confess. Both officers testified flat out they had "no evidence" upon which to charge Bruno's son, but they kept him in custody, anyway. He was their hostage. They deluded Mr. Bruno into confessing by lying about the importance of his statement in ensuring his son's release. "Techniques calculated to exert improper influence, to trick, or to delude the suspect as to his true position will also result in the exclusion of self-incriminating statements thereby obtained." Thomas v. State, 456 So.2d 454, 458 (Fla. 1984) (citing, Blackburn v. Alabama, 366 U.S. 199 (1960), Bram, supra, Frazier v. State, 107 So.2d 16 (Fla. 1958), and Harrison v. State, 152 Fla. 86, 12 So.2d 307 (1943). The deceptive and coercive police conduct here undoes the state's hope it has satisfied its burden of showing voluntariness. The confession, and the evidence subsequently seized, i.e., the gun pieces, must be suppressed and this case reversed for a new trial.

b. Mr. Bruno was deprived of his fifth amendment right to remain silent.

The right to cut off questioning is a "critical safeguard" of the Fifth Amendment, protected by the procedural guidelines of Miranda v. Arizona, 384 U.S. 436 (1966). Michigan v. Mosley, 423 U.S. 96, 1093 (1975). The police are required to immediately cease interrogation once a suspect "indicates in any manner, at any time ... during questioning, that he wishes to remain silent." Miranda, 384 U.S. at 473-74; Mosley, 423 U.S. at 100; Christopher v. The State of Fla., 824 F.2d 836, 839 (11th Cir. 1987). A statement taken subsequent to invocation of silence is inadmissible unless the suspect's "'right to cut off questioning' was 'scrupulously honored'." Mosley, 423 U.S. at 101, 103-04. Here, Mr. Bruno's explicit desire to cut off questioning was instead "scrupulously"

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[22] See Annotation, "Voluntariness of Confession as Affected by Police Statements that Suspect's Relatives will Benefit by the Confession," 51 ALR 4th 495 (1987).

ignored.

Both officers testified Mr. Bruno indicated he would stand on his previous statement when first questioned. R 33-4; 49-51. Yet Manfre engaged him in an emotional dialogue about his son, which contributed to his decision to make a statement. Under these circumstances, Miranda and Mosley were violated. Mr. Bruno's right to remain silent was violated for other reasons, as well.

The state has the heavy burden of establishing "an intentional relinquishment of a known right or privilege," Johnson v. Zerbst, 304 U.S. 458 (1938), and this Court must "indulge in every reasonable presumption against waiver". Brewer v. Williams, 430 U.S. 387, 404 (1977). "Moreover, any evidence that the accused was threatened, tricked, or cajoled will, of course, show that the defendant did not voluntarily waive his privilege." Miranda, 384 U.S. at 476. There is plenty of such evidence here in Manfre's urging Mr. Bruno to give a statement and comments about what would happen to his son in jail, compounded by Edgerton's promise to free Bruno, Jr. Independently or together these circumstances are sufficient to render the waiver invalid.

c. The questioning violated the Fifth and Fourteenth Amendments and Article I, Sections 9 and 16, Florida Constitution.

Mr. Bruno's confession is also inadmissible under Haliburton v. State, 514 So.2d 1088 (Fla. 1987), where the police failed to inform a defendant that a member of his family had retained an attorney for him and the police refused the attorney's request to cease questioning the defendant. This Court found the police conduct violated the due process under Article I, Section 9 of the Florida Constitution. Quoting the dissenting opinion of Justice Stevens in Moran v. Burbine, 475 U.S. 412 (1986), the court emphasized "there can be no constitutional distinction between or deceptive misstatement on the concealment by the police of the critical fact that an attorney retained by the accused or his family has offered assistance, either by telephone or in person." Haliburton, supra at 1090. (footnote omitted in opinion).

In this case, the trial court found that the phone call from Michael Castoro came after Appellant had given the incriminating statement at 8:59. R 98. While a trial court's findings must be accepted if there is evidence to support them, State v. Navarro, 464 So.2d 137 (Fla. 3d DCA 1984), Florida courts

are not bound to accept a trial court's determination of questions of fact at a motion to suppress when, as here, that determination is clearly shown to be without basis in evidence or predicated upon incorrect application of the law. Id. at 140, State v. Simpson, 443 So.2d 209, 210 (Fla. 3d DCA 1983), State v. Fernandez, 526 So.2d 192 (Fla. 3d DCA 1988).

Though the tape recorded statement was purported to begin at 8:59 and the officer was sure it took far less than one hour, R 71-72, the tape was concluded at 10:10. R 71-72. A statement was taken from Mr. Bruno's son first, R 959, and Edgerton was clear that Mr. Bruno's statement was taken after his son's was completed. R 53. Since the statements were taken in the same room, R 43, there must have been a significant passage of time from Bruno's initial refusal to speak at 8:04 p.m. Also, Mr. Castoro testified that Edgerton seemed "anxious" to take a statement when he called, and did not indicate a statement had already been taken. R 9, 15. Edgerton's testimony does not really dispute this. He testified the phone call was at "9 or 9:15," R 53, 69, and does not say the statement was already taken. See R 55, 59-60. This evidence supports the conclusion that the statement was taken after counsel called, whether at 8:59 or 9:59. Furthermore, when Doderer arrived at the station house, sometime around 10:00 o'clock, Edgerton would not let her see Mr. Bruno because he was giving a statement. R 19. This corroborates the fact that the taped statement concluded at 10:10 p.m. The only reasonable conclusion is that the taped statement was taken after his attorney called and the interrogation and taking of the statement violated due process under Haliburton.

This Court's opinion in Harvey v. State, 529 So.2d 1083 (Fla. 1988), supports our Haliburton claim. There a public defender, not yet appointed to represent Harvey, sought to speak with him before a statement was taken, but was not allowed to speak with him until after the statements (but prior to his first appearance before a local judge.) Id. at 1085. This Court distinguished Haliburton, emphasizing that Haliburton's sister had called a specific attorney who was denied permission to speak with his client. Id. Similarly, the instant case is one where a relative retained an attorney for the defendant and the attorney was denied permission to speak with his client. Just as the unsolicited nature of the contact sought by the public defender in Harvey distinguished it

from Haliburton's vicariously solicited contact, the retention of an attorney by the family at bar makes Haliburton applicable. Due process requires the suppression of Appellant's taped statement.[23]

d) The trial court erred in deferring its function to the jury at the motion to suppress hearing.

A defendant who challenges the admissibility of his statement, especially on voluntariness grounds, is entitled to pre-trial determination of admissibility and voluntariness, and resolution of disputed factual questions by a judge.[24] The failure to follow these procedures denies due process of law and effective assistance of counsel under Article I, Sections 2, 9, 12, 16, 17 and 23 of the Florida Constitution and the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.[25]

The judge's ruling and reasoning in the present case is virtually identical to the procedures and reasoning in Jackson v. Denno, Sims, McDole, and Greene. In this case, defense counsel filed a pre-trial Motion to Suppress Statements and Physical Evidence with a memorandum. R 1010-1030. The motion and memo alleged that the statements were involuntary and illegally obtained under the Florida and Federal Constitutions, that they were taken in violation of Haliburton v. State, 476 So.2d 192 (Fla. 1985), Miranda v. Arizona, 384 U.S. 436, (1966) and Edwards v. Arizona, 451 U.S. 477, (1981), and other allegations. There was a pre-trial evidentiary hearing at which five witnesses testified and at which there was some conflict in the testimony as to key issues. R 4-98. The totality of the trial court's ruling on this motion is as follows:

> THE COURT: I know there was quite a diversity as to what the conversation was between the testimony of Lieutenant Manfre and the

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[23] Jones v. State, 528 So.2d 1171 (Fla. 1988) held that Haliburton did not apply retroactively to a case arising in 1981 and before the court on appeal from an order denying postconviction relief. The instant case is clearly distinguishable. This Court decided Haliburton August 30, 1985. The United States Supreme Court vacated and remanded the decision for reconsideration in light of Moran v. Burbine, supra, on March 24, 1986. This Court affirmed its prior decision on due process grounds on October 1, 1987. The fact that nearly two years prior to Appellant's arrest Haliburton had been the law in Florida distinguishes Jones.

[24] Jackson v. Denno, 378 U.S. 468, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); Sims v. Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967); McDole v. State, 283 So.2d 553 (Fla. 1973); Land v. State, 293 So.2d 704 (Fla. 1974); Greene v. State, 351 So.2d 941 (Fla. 1977).

[25] This is especially true in a capital case involving a unique need for reliability pursuant to the Eighth Amendment and Article I, Section 17.

> defendant, Mr. Bruno, and of course, that's what we have juries for, to make judgments as to questions of facts and in weighing credibility of witnesses.
>
> I would also observe that you gentlemen are well aware of the instructions given to the jury that if they find that the statement was not, if it is not freely and voluntarily made then they themselves may disregard it.
>
> But for the purpose of this hearing, and based upon the conflict in the testimony, I believe that it is a matter for the jury to determine.
>
> And I do find that the statement as related starting at 8:59 was knowingly, freely and voluntarily given.
>
> So I deny your motion.
>
> Okay, what else do we have?

T 97-98.

The judge felt it was not his function to resolve any factual disputes and that he had to defer to the jury if there were any factual disputes or credibility questions involved. This is precisely the procedure condemned by this Court and the United States Supreme Court.

The seminal case in this area, Jackson v. Denno, involved a procedure and reasoning identical to that employed here. Jackson, supra, involved the procedures employed by New York State.

> Under the New York rule, the trial judge must make a preliminary determination regarding a confession offered by the prosecution and exclude it if in no circumstances could the confession be deemed voluntary. But if the evidence presents a fair question as to its voluntariness, as where certain facts bearing on the issue are in dispute or where reasonable men could differ over the inferences to be drawn from undisputed facts, the judge "must receive the confession and leave to the jury, under proper instructions, the ultimate determination of its voluntary character and also its truthfulness." Stein v. New York, 346 U.S. 156, 172, 73 S.Ct. 1077, 1086, 97 L.Ed. 1522. If an issue of coercion is presented, the judge may not resolve conflicting evidence or arrive at his independent appraisal of the voluntariness of the confession, one way or the other. These matters he must leave to the jury.

378 U.S. at 377-8 (Footnotes omitted).

The Court found this procedure violated the Due Process Clause and required that courts to make an independent determination of voluntariness. Id. at 391. The Constitution specifically requires the trial judge to resolve all disputed factual issues on which voluntariness depends.

This Court has strictly applied the requirements of Jackson. In McDole, the trial court denied a motion challenging the voluntariness of a confession, saying the jury could hear the same evidence and "give what weight they consider

appropriate to this alleged confession." This Court reversed on the ground that a judge cannot defer his responsibilities to the jury. 283 So.2d at 553-554. Greene involved a similar situation:

> Prior to trial, petitioner made a motion to suppress a confession allegedly coerced from him by the police. The trial court denied this motion to suppress with the simple statement "I am going to deny your motion to suppress. I think you can argue all that to the jury."

351 So.2d at 941. This Court reversed the conviction, again recognizing that it is improper to defer resolution of this issue to the jury.

The present case involves the precise situation condemned in these cases. The trial court explicitly stated it felt that since there were disputed issues of fact "that's what we have juries for, to make judgments as to questions of facts and in weighing credibility of witnesses." R 98. The court went on to say, "Based upon the conflict in the testimony, I believe that it is a matter for the jury to determine." R 98. Thus, the judge made precisely the error condemned in Jackson and Sims, leaving it so the jury to resolve any disputed issues of fact. The trial court also explicitly relied on the improper rationale that counsel could again contest voluntariness in front of the jury.

It is true that the trial judge used the "magic words," i.e. "I find that the statement -- was knowingly, freely and voluntarily given." R 98. But this simple sentence was not the thrust and underpinning of the ruling. It was a ritual incantation, as an afterthought, not the basis of the ruling.[26] The trial court felt it had to defer to the jury if there were factual disputes. It felt that any problems were cured by counsel's right to argue voluntariness to the jury. Mr. Bruno never received a proper trial court review of his motion to suppress under Jackson v. Denno, and its progeny. This Court should reverse and remand for a new trial with a proper Motion to Suppress hearing.

2. THE EVIDENCE OF INTENT TO ROB IS INSUFFICIENT, REQUIRING REVERSAL OF THE ROBBERY CONVICTION.

Property was taken and force was used but in this case there was only theft, not robbery. To prove specific intent, the "force" and "taking" required for robbery must take place in tandem, and they didn't here.

No one says the stereo equipment was stolen at the time the killing was

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[26] This issue is like a jury instruction issue. The whole must be examined, not isolated fragments. Cf. Austin v. State, 40 So.2d 896, 897 (Fla. 1949).

committed. It was taken hours, perhaps even a day, afterward. Bruno, Jr., testified nothing was taken from Merlano's apartment at the time of the killing, R 441, and the person who saw Appellant return to the house that evening did not see him bring anything in. R 344-45. Parts of the stereo were noticed in the house the next day by some in the Spalding-Maheu family. The testimony showed Mr. Bruno left Merlano's apartment empty-handed, returning two or three times over the course of the next two days. R 433. The violence was far removed in time from the taking.

"Robbery" means "the taking of money or other property ... from the person or custody of another by force, violence, assault, or putting in fear." §812.13, Fla. Stat.(1986). This Court has held: "the legislature did not alter the common law requirement that 'force, violence or putting in fear' must occur prior to or contemporaneous with the taking of the property." Royal v. State, 490 So.2d 44, 45 (Fla. 1986). Accord, McConnehead v. State, 515 So.2d 1046, 1048 (Fla. 4th DCA 1987). Specific intent to steal is an essential element of robbery, Bell v. State, 394 So.2d 979 (Fla. 1981), and without the tether of time, that element disappears.

The reasoning of Royal carries no less force where the taking of property is removed to a time well after force is used, as occurred here. This Court recognized Royal's application to such a scenario in a related context in State v. McCall, 524 So.2d 663 (Fla. 1988). McCall was convicted of murder and sentenced above the guidelines based in part on events occurring after the death of the victim. This Court disallowed any departure for sexual battery, because a corpse cannot be. Id. at n. 1. Along the same lines, this Court has forbidden consideration of a murder defendant's treatment of the victim's body after death for purposes of applying the heinous, atrocious or cruel aggravating factor. Jackson v. State, 451 So.2d 458 (Fla. 1984). In Fowler v. State, 492 So.2d 1344 (Fla. 1st DCA 1988), the court vacated a robbery conviction and reduced it to grand theft, concluding the victim's wallet was taken after his death.

Evidence of intent to rob is almost nonexistent here. The closest the state came to showing a motive for the crime was Sharon Spalding Maheu's statement that around the last week in July she spoke with Bruno about a man living at Candlewood Apartments. R 449. Bruno told her then that because of the

man's "stupid mistake" eight or nine of Bruno's friends had been killed in Viet Nam, and he was going to get even with him. R 450. Another state witness works said that on the night of the killing Bruno invited her to a "murder party". R 378. This is not the stuff of which a robbery conviction is made.

Bruno's own statement to the police (played to the jury) is consistent with theft as an afterthought. In it, he recounts a struggle, after which he killed Merlano. SR 11. Bruno said he only decided to take the stereo equipment after realizing what he had done, and went back to get it "within a half hour." SR 11-17. The statement is entirely consistent with the circumstances and the testimony of other witnesses, and negates intent to rob.[27]

The only evidence suggesting intent to rob is qualified and oblique. Stephen Mazella testified that a month before, and again on the evening of the killing, Bruno asked to use his car to "borrow a bunch of stereo equipment from a friend." R 409. There was no mention of who the friend was, and no statement that Bruno was going to steal anything. There was no evidence that money or anything of value was taken from the apartment at the time the killing occurred.

There have been few deviations from the standard guiding review of the sufficiency of the evidence. The standard is: "where the only proof of guilt is circumstantial no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." McArthur v. State, 351 So.2d 972, 976 n. 12 (Fla. 1977) (citing Davis v. State, 90 So.2d 629 (Fla. 1956) and Mayo v. State, 71 So.2d 899 (Fla. 1954). Accord, Law v. State, 14 FLW 387 (Fla. July 27, 1989), Bello v. State, 14 FLW 339 (July 6, 1989), and Wilson v. State, 493 So.2d 1019 (Fla. 1986).[28] This Court recently reaffirmed McArthur, particularly in cases where intent is in issue saying: "Obviously, care must be exercised when the evidence of the requisite intent is circumstantial. In such instances, the state must prove that the evidence is inconsistent with any reasonable hypothesis of innocence." Thomas v. State, 531 So.2d 708, 710 n.2 (Fla. 1988).

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[27] In fact, the State argued at penalty phase that "I don't care if you find [financial gain] as an aggravating circumstance or not because he didn't do it to get money from the stereo equipment." R 888.

[28] But see, Heiney v. State, 447 So.2d 210, 212 (Fla. 1984), and Rose v. State, 425 So.2d 521 (Fla. 1983).

It did not here.

3. THE FIRST DEGREE MURDER CONVICTION URGED ON ALTERNATIVE THEORIES MUST BE REVERSED.

The indictment charged Mr. Bruno with the premeditated murder of Lionel Merlano. R 960. Over defense objection, that charge was converted into alternative premeditated and felony murder theories of prosecution, as permitted by this Court's decision in Knight v. State, 338 So.2d 201 (Fla. 1976). See also Adams v. State, 341 So.2d 765, 767 (Fla. 1967). The jury was told both by the prosecutor during closing, R 700,702, and by the judge when he instructed them, R 1051-52, that they could find Mr. Bruno guilty of first degree murder on either premeditated or felony murder theories. The jury returned a general verdict of guilty of first degree murder. R 1076.

a. Because the evidence of the underlying felony of robbery was insufficient, the first degree murder conviction is unlawful.

The fall of the robbery conviction addressed above brings down the first degree conviction as well. "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, 1806 (1988).[29] Capital cases require an even greater 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 (1980).[30]

With some exception[31] Florida requires reversal where evidence on one of two included charges is insufficient. In Bashans v. State, 388 So.2d 1303 (Fla.

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[29] Accord, Zant v. Stephens, 462 U.S. 862, 889-85 (1983); Yates v. United States, 354 U.S. 298 (1957); Stromberg v. California, 283 U.S. 359, 367-368 (1931). See also, Crawford v. State, 254 Ga. 435, 330 S.E. 2d 508 (1985), applying this principle to the alternative felony murder/premeditation scenario.

[30] In Beck, failure to provide a lesser included offense instruction in murder prosecutions was found unconstitutional, because "uncertainty and unreliability [in] the fact finding process cannot be tolerated in a capital case"). See Andres v. United States, 330 U.S. 740, 752 (1948) (where jury might have concluded from instructions that unanimity was required to grant mercy, as well as find guilt, in pre-Furman unified trial, proceeding was unconstitutional. "In death cases doubts such as these presented here should be resolved in favor of the accused.").

[31] See Adams v. State, 341 So.2d 765, 767 (Fla. 1977), discussed below.

1st DCA 1980), two separate crimes were alleged in a single count. A general verdict of guilt was returned, but the reviewing court found the evidence on one of the charges insufficient. The First District reversed:

> Since it is impossible to determine whether the jury found appellant guilty of the charge on which the evidence was sufficient or guilty of the charge on which the evidence was insufficient, this point also requires a new trial. Neither this Court nor the trial court is privileged to make this determination for the jury.

Bashans, 388 So.2d at 1303. (emphasis supplied). Accord, McGahagin v. State, 17 Fla. 665 (Fla. 1880).

This Court has used a harmless error analysis in like cases, looking to the record to determine whether the evidence of premeditation is sufficient, where there is an improper instruction on the underlying felony. See Adams v. State, 412 So.2d at 853. That approach has been termed "incorrect" under Stromberg by the United States Court of Appeals, in Adams v. Wainwright, 764 F.2d 1356, 1362 (11th Cir. 1985). "The proper approach is to examine only the trial court's instructions and the jury's verdict, not the sufficiency of the evidence to support the verdict." Id. at 1362. Here, the judge's instructions and prosecutor's argument both directed that the jury could find Mr. Bruno guilty of first degree murder on the (insufficient) robbery-murder theory. 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.

b. The absence of a unanimous jury finding of guilt on any one theory requires the verdict be set aside.

Although instructed the verdict must be unanimous, the jury was not required to unanimously agree on precisely what Mr. Bruno was guilty of: premeditated murder or felony murder based on robbery. 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 (1980).[32] A requirement of jury unanimity on the "verdict" misses

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[32] 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. If not, the appellant suggests this Court should recede from its holding.

the constitutional mark where the jury is instructed on two 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, 7148 F.2d 577, 582 (11th Cir. 1984); United States v. Gipson, 533 F.2d 453, 458 (5th Cir. 1977). As 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.

Some jurors may have found Mr. Bruno guilty of premeditated murder. Some may have doubts he committed the actual killing but thought he was there and later stole the stereo equipment, concluding he was guilty of robbery-murder. The different allegations and defense attributable to each -- particularly here, where the stereo was stolen at a time well after the killing occurred -- are not amenable to a single "conceptual grouping."[33] A separate unanimity instruction was thus unquestionably required, and the conviction must be reversed. See also, United States v. Paysano, 782 F.2d 832 (9th Cir. 1986); United States v. Frazier, 780 F.2d 1461 (9th Cir. 1986); State v. James, 698 P.2d 1161 (Alaska 1985); People v. Wagley, 177 Cal. App. 3d 397, 223 Cal.Rptr. 9 (1986).

c. The first degree murder conviction violates due process and Florida law where the underlying felony used to transfer intent, if it occurred at all, happened well after the killing.

Florida permits the jury to impute intent to kill from intent to commit an underlying felony. Adams v. State, 341 So.2d 765, 768 (Fla. 1977). Robbery-murder was the alternative theory argued by the prosecutor here, R 700-02, and

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[33] See State v. Green, 616 P.2d 628 (Wash. 1980) (en banc) (two underlying felonies, rape and kidnapping. Court holds jury must be instructed to find one or both unanimously); Johnson v. United States, 398 A.2d 354, 369-70 (D.C. Ap. 1979) (where defendant is charged with assault with intent to kill, reversible error to instruct jury that it could convict by finding the defendant either threw the victim out the window or into a river at a later time). State v. Benite, 6 Conn. Ap. 667, 507 A.2d 478, 483 (1986) (where actions necessary to violate one statute or subsection are distinct from those necessarily to violate another, jurors not required to agree on which one proven have not agreed on the actus reus and unanimity requirement violated).

instructed by the judge.[34] We have briefed the evidence which unquestionably shows the taking of Mr. Merlano's property was at a time removed from the killing. Transferring intent from the post hoc taking to create a felony murder violates due process and Florida law.

This Court has concluded there are constraints on the application of the felony murder rule. In Bryant v. State, 412 So.2d 347 (Fla. 1982), the appellant had been convicted of first degree murder. The evidence showed that Mr. Bryant had participated in robbery, assisted in tying the victim up, placed him on a bed, then left. His accomplice stayed, and sexually assaulted the victim. The victim ultimately died of asphyxiation, though apparently not from the cord which Mr. Bryant had used to tie him up. Trial counsel sought and was denied a instruction on independent act. This Court reversed, ruling that the refusal to instruct the jury on independent act unlawfully prevented Mr. Bryant from arguing the defense theory that he was not legally responsible for the death of the victim. This Court found the transferred intent theory of felony murder is "circumscribed":

> Since it is the commission of a homicide in conjunction with intent to commit the felony which supplements the requirement of premeditation for first degree murder, Fleming v. State, 374 So.2d 954 (Fla. 1979), there must be some causal connection between the homicide and the felony.

412 So.2d at 350 (emphasis supplied).

This principle applies at bar. The taking here was well after, and unrelated to, the killing, but the jury was told they could use robbery to find Mr. Bruno guilty of first degree murder, anyway. Bryant compels reversal.

4. THE TRIAL COURT ERRED IN FAILING TO HAVE A COURT REPORTER PRESENT DURING BENCH CONFERENCE DURING VOIR DIRE.

There are numerous unreported bench conferences during voir dire. R 215, 241, 255, 269, 278. It appears from the existing record that both cause and peremptory challenges were made at these unreported bench conferences. The Jury Challenge Slips indicate defense counsel used all ten (10) of his peremptory challenges. Second Supplemental Record at 141-144.

The right to due process and effective assistance of counsel entitle a

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[34] Defense counsel objected to the state's use of this theory here pretrial, R 1040, R 104, during trial, R 653, R 666, and posttrial. R 1088.

defendant to a complete record on appeal. Lipman v. State, 428 So.2d 733, 737 (Fla. 1st DCA 1983).[35] The right to a complete record includes voir dire. Loucks v. State, 471 So.2d 131, 132 (Fla. 4th DCA 1985). This is especially true in a capital case which involves a unique need for reliability under the Eighth Amendment and Article I, Section 17 and involves a broader scope of appellate review. Delay v. State, 350 So.2d 462, 463 (Fla. 1977); § 921.141, Florida Statutes (1987); Rule 9.140(f), Florida Rules of Appellate Procedure.

Rule 2.070,(a) Florida Rules of Judicial Administration requires court reporting in all criminal proceedings. Subsection (b) is explicit:

> **(b) Record.** When trial proceedings are being reported, no part of the proceedings shall be omitted unless all of the parties agree to do so and the court approves the agreement.

Rule 2.070, Florida Rules of Judicial Administration. The plain language of this rule is mandatory; all criminal proceedings must be reported, and (2) any reported proceeding must be reported completely, unless all parties agree and the trial court approves the agreement.

Here, there were unreported bench conferences during jury selection without the consent of any party. This error was prejudicial as the current record demonstrates challenges for cause to several jurors. The standard is clear for cause challenges: "If there is any reasonable doubt" as to the juror's impartiality he must be excused despite the juror's protestations of impartiality. Hill v. State, 477 So.2d 553, 555-556 (Fla. 1985); Singer v. State, 109 So.2d 7 (Fla. 1959). Juror Hrytzay indicated that she would give improper weight to police witnesses over other witnesses (R 198-203), certainly raising a "reasonable doubt" about her partiality, and Juror Henry indicated that she would penalize Mr. Bruno for not testifying. R 265-266. The trial judge coerced Juror Henry to make a pro forma statement of "following the law" but that does not erase her previous spontaneous and honest answers. Hill, supra at 555-556; Singer, supra at 555-556. Both Ms. Henry and Ms. Hrytzay were proper cause challenges.

The failure to have a court reporter is prejudicial. Mr. Bruno used all ten peremptory challenges. Second Supp.Rec. 141-144. Proper defense cause

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[35] Article I, Sections 2, 9, 16 and 17 of the Florida Constitution; Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

challenges existed. There is a likelihood that Mr. Bruno moved to challenge these jurors; the challenges were denied, and counsel unsuccesfully asked for more peremptory challenges. Failure to have a court reporter has denied Mr. Bruno appellate review of these issues.[36]

Appellant's conviction must be reversed and remanded for a new trial due to the failure to have a court reporter at voir dire.[37]

5. THE TRIAL COURT ERRED IN REFUSING TO RELEASE GRAND JURY TESTIMONY OR TO HAVE AN IN CAMERA INSPECTION OF THE GRAND JURY TESTIMONY.

The refusal to release grand jury testimony or conduct an in camera inspection of the grand jury testimony in this case was unlawful.[38] Mr. Bruno filed three motions requesting disclosure of grand jury materials, including all grand jury testimony. R 964-965, 978-988, 1007-1008. The motions specifically requested in camera inspection by the judge in the alternative. R 978. Defense counsel also filed a Motion for Disclosure of any Impeaching Evidence and a Motion to Compel Disclosure of Evidence Favorable To The Defendant. Second Supp. Rec. at 50-58, 61-62. The defense specifically requested all transcripts of prior testimony. R 55. This was predicated on the possibility material contained (or could lead to) prior inconsistent statements or other exculpatory material. R 55. The defense also specifically requested exculpatory statements. R 61. The trial judge denied any release or in camera inspection of the grand jury materials orally and in a written order. R 110-111, R 1009.

The Court outlined the general principles governing this issue in a case in which it reversed a conviction for failure to disclose grand jury testimony: "Disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." Dennis v. United States, 384

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[36] There may be other important appellate issues arising out of these unreported bench conferences. The trial judge may have erroneously granted state cause challenges, placed improper time limits or subject limits on voir dire, or committed other errors.

[37] Assuming this Court feels a new trial is not required, a remand and reconstruction of the record is required. Appellant filed an unopposed motion to reconstruct these unreported bench conferences, but this Court denied it, precluding proper appellate review. Delap, supra; Lipman, supra. This Court should grant a new trial or at least a remand to reconstruct the record.

[38] Under the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 2, 9, 16 and 17 of the Florida Constitution and Rule 3.220 of the Florida Rules of Criminal Procedure.

U.S. 855, 870, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966). The Eleventh Circuit followed suit in Miller v. Wainwright, 798 F 2d 426 (11th Cir. 1986) ordering inspection.

The threshold for in camera review is far lower than that required for actual release of grand jury testimony to defense counsel, and the right to that review of otherwise confidential materials in a criminal prosecution was further extended by the Court's decision in Pennsylvania v. Ritchie, 480 U.S. 39 107 S.Ct. 989 (1987). In Ritchie, the Court held that the defendant was entitled to in camera review despite public policy and specific statutes, favoring confidentiality of sensitive material. 107 S.Ct. at 1001-1002. The Eleventh Circuit reconsidered its prior opinion in Miller, supra in light of Ritchie, supra, Miller v. Dugger, 820 F.2d 1135 (11th Cir. 1987) holding:

> The Supreme Court's reasoning and decision in Ritchie is an endorsement of the procedures the Court recommended and the holding we reached in Miller.

820 F.2d at 1136.

Hopkinson v. Shillinger, 866 F.2d 1185 (10th Cir. 1989) applies the principles of Ritchie to grand jury testimony. In Hopkinson, the court held the petitioner was entitled to in camera review under Miller and Ritchie, pointing out that "exculpatory evidence could have been presented" and how in camera review preserves state confidentiality interests.[39]

In our case, Mr. Bruno filed several motions for release of grand jury proceedings or in camera review. He also filed several motions for the release of exculpatory evidence, or impeaching evidence, relying on Florida law and Brady v. Maryland, 373 U.S. 83 (1963) and Napue v. Illinois, 360 U.S. 264 (1959). This is a far more detailed request than that made in Ritchie and Hopkinson, supra. Thus, in camera review is required without any further basis. But in this case there is a compelling need for in camera review as virtually

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[39] In a related case, the doctrine of the secrecy of grand jury proceedings was further limited. In Smith v. Butterworth, 868 F.2d 1527 (11th Cir. 1989), a newspaper reporter who had testified before a grand jury wished to, "publish a news story and possibly a book about the subject matter of the special grand jury's investigation, including what he observed of the process and the matters about which he testified." 868 F.2d at 1528. The Eleventh Circuit held that a witness' First Amendment right to speak about his own testimony outweighs the statutory prohibition (§ 905.2 Florida Statutes (1985)) against revealing grand jury proceedings. Smith is further recognition that an individual's constitutional rights can outweigh the rule of secrecy, whether based on statute, case law, or public policy.

every major prosecution witness initially withheld evidence, lied to the police, and/or was possibly implicated in the offense either as a principal or an accessory after the fact.[40] The situation here is akin to that in Miller, where many of the key witnesses had made prior inconsistent statements. In some respects the facts here are more striking than in Miller, as this case involves witnesses who admittedly were involved in the offense or were accessories after the fact and who were never charged with any offense. In Miller the Eleventh Circuit ordered in camera review of the grand jury testimony and it was ultimately released to defense counsel. 820 F.2d 1137. The same result is required in this case.[41]

Mr. Bruno's conviction must be reversed and remanded for a new trial due to the trial court's failure to release grand jury testimony.

6. THE COURT ERRED IN LETTING THE PROSECUTION PURSUE A FELONY-MURDER THEORY AS THE INDICTMENT GAVE NO NOTICE OF SUCH A THEORY.

The trial court unlawfully let allowed the prosecution pursue a felony-

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[40] Christopher Tague admitted the gun was his. R 346. He admitted the police told him he could be charged as an accessory after the fact if he did not give a statement. R 363-364. Jody Spalding admitted lying to the police initially. T 408-409. He also admitted that the police told him that he would be charged as an accessory after the fact. R 407. He also admitted using the deceased's electronic equipment after it was allegedly taken. R 411.

Michael Bruno, Jr. claims to have been present at the homicide and handled Mr. Bruno the gun. R 429-431. Thus, he admitted to being a participant and to being at least arguably guilty of First Degree Murder. He admitted lying to the police. R 436-437. He only came forward with his claim to be present and participating in the offense six weeks before trial. R 648-649. He was given immunity, even though he admitted participating in the alleged offense. R 162. Thus, the key prosecution witness totally changed his testimony, and received immunity, even though he admitted extensive involvement.

Sharon Spalding Maheu admitted initially lying to the police. R 452. She admitted first using and then hiding stereo equipment taken from the deceased. R 453, 454-456. She only changed her statement after the police came back and accused her of withholding information. R 455. The police specifically told her that she was a suspect and that she could be charged as an accessory after the fact. R 480-481. Arthur Maheu, Sharon's husband, admitted that he did not come forward until months after the incident, even though the police had previously questioned his wife and stepson. R 570-571. He also admitted having the allegedly stolen stereo equipment knowing that it was probably evidence in a homicide, and to not initially turning it over to the police. R 573-574.

[41] Counsel is aware of Jent v. State, 408 So.2d 1024 (Fla. 1981), holding that the defense attorney failed to make a proper predicate for release or in camera review of the grand jury testimony. 408 So.2d at 1027-1028. It is highly questionable whether Jent is still the law, at least in terms of in camera review, in light of subsequent case law including Ritchie, Miller, Hopkinson, and Smith. In any case the proper predicate under Jent was laid here.

murder theory, despite the fact that the indictment contains no notice of such a theory. Appellant filed a pre-trial motion to have the State elect between felony murder and premeditated murder. R 1040-1043. This motion was orally argued pre-trial and denied. T 107-109. The jury was ultimately instructed on felony-murder. R 1051-1052.

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 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 (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); Gray v. Raines, 662 F.2d 569, 570-572 (9th Cir. 1981); United States v. Rojo, 727 F.2d 1415, 1418 (9th Cir. 1983); Givens v. Housewright, 786 F.2d 1380-1381 (9th Cir. 1986); United States v. Kurka, 818 F.2d 1427 (9th Cir. 1987). Appellant is aware this Court rejected a related claim in Knight v. State, 338 So.2d 201, 204 (Fla. 1976). However, Knight was well before Givens, which holds its reasoning to be contrary to the Sixth Amendment.[42] This Court should recede from in Knight.

7. THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR PSYCHIATRIC EXAMINATION OF THE STATE'S STAR WITNESS.

Appellant's son, Michael Bruno, Jr., was the state's main witness. He was the only eyewitness, and his testimony at trial was substantially different from statements he had previously made to the police. Prior to trial, Mr. Bruno brought to the trial court's attention the substantial question as to this witness's competence to testify. He moved for a psychiatric examination of the witness and attached to the motion a letter from the psychiatrist treating him. R 128-31. The letter related that the witness suffered from memory impairment and "dissociative states in which he is unable to respond to the world around him," and was otherwise suffering from a serious mental disturbance. R 131. It

[42] This is especially true in a capital case involving the unique need for reliability under the Eighth Amendment and Article I, Section 17 of the Florida Constitution.

appears the trial court denied this motion out of hand.[43]

The admission of crucial testimony for the state through an incompetent witness violates due process. Sinclair v. Wainwright, 814 F.2d 1516, 1522-23 (11th Cir. 1987). The failure of a trial court to order the psychiatric examination of a crucial state witness violates due process where the record shows a legitimate basis for it. See Dinkins v. State, 244 So.2d 148 (Fla. 4th DCA 1971) and State v. Coe, 521 So.2d 373 (Fla. 2d DCA 1988).

Under the facts at bar, the trial court erred by failing to order the examination of the state's main witness. The undisputed facts set out in the psychiatrist's letter showed that the witness had a defective memory and was out of touch with reality. These facts raise grave doubts about the witness's competence to testify, and were strong and compelling reasons for a psychiatric examination.[44] The trial court's error deprived Mr. Bruno of his due process right to be tried on the basis of competent evidence.

8. THE ERRONEOUS ADMISSION OF TESTIMONY CONCERNING WITNESSES' FEAR OF APPELLANT DENIED HIM A FAIR TRIAL.

Two witnesses' irrelevant and inflammatory remarks that they were in fear of Mr. Bruno denied him due process of law and were contrary to Article I, Sections 2, 9, 16 and 17 and the Fifth, Sixth, Eighth, and Fourteenth Amendments. Mr. Bruno made a pre-trial motion to exclude collateral bad act evidence,

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[43] See Trial counsel's affidavit, stating that he believes the trial court denied the motion. This Court's refusal to allow supplementation of the record with a transcript of the hearing on the motion or remand to the trial court to reconstruct the record violates appellant's right to full appellate review on the basis of a complete record as required by section 921.141(4), Florida Statutes and the Due Process and Equal Protection Clauses of the state and federal constitutions. See e.g., Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed.891 (1956). The refusal to allow the making of an appellate record constitutes per se reversible error. Pender v. State, 432 So.2d 800 (Fla. 1st DCA 1983) (refusal to allow proffer of evidence) and Loucks v. State, 471 So.2d 131 (Fla. 4th DCA 1985) (refusal to have court reporter transcribe voir dire examination of prospective jurors.) Denial of a full appellate review in this capital case as set out in Zant v. Stephens, 456 U.S. 410, 413-414, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), denies the certainty in decision making required by the Eighth Amendment and deprives appellant of his constitutional right to effective assistance of appellate counsel.

[44] Since the use of the testimony of this doubtful witness carried into the sentencing phase, the failure to order examination of the witness violated the appellant's eighth amendment right to great reliability in fact-finding in capital sentencing as set out in, e.g., Elledge v. State, 346 So.2d 998 (Fla. 1977) and Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). See Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir. 1982) ("Reliability in the fact-finding aspect of sentencing has been a cornerstone of [death penalty] decisions.").

R 1034-1039, and after argument, R 104-106, the prosecution agreed not to bring up any such evidence. R 106. Nevertheless, the prosecutor brought out on direct examination of Jody Spalding that he didn't go to the police at first because he was "worried about what [Mr. Bruno] might do to me and my family," and again, that "you never know what he might do to us." R 403-404. The prosecutor elicited similar testimony from Sharon Spalding Maheu, that she didn't go to the police because she was "scared of [Mr. Bruno] doing something to my family," and didn't tell the truth at first because she was "scared." R 452. Thus, the prosecutor twice intentionally brought out the witnesses' supposed fear of Mr. Bruno, in violation of his previous agreement.

Testimony that a witness is in fear of a defendant is akin to testimony that a witness had been threatened. It leaves the implication that the witness has been threatened by the defendant. Florida courts have consistently held that testimony concerning threats to a witness are inadmissible, unless these threats can be specifically connected to the defendant, and that its admission is reversible error. State v. Price, 491 So.2d 536 (Fla. 1986); Jones v. State, 385 So.2d 1042 (Fla. 1st DCA 1980); Coleman v. State, 335 So.2d 364 (Fla. 4th DCA 1976); Reeves v. State, 423 So.2d 1017 (Fla. 4th DCA 1982). At bar, there was absolutely no basis shown for any fear of Mr. Bruno by any witness, and no evidence that Mr. Bruno had threatened any witness.

The error is like that condemned Jackson v. State, 451 So.2d 458 (Fla. 1984), where a witness recounted the defendant's claim that he was a "thorough-bred killer Id at 460-461. This Court analyzed the issue under Williams v. State, 110 So.2d 654 (Fla. 1959) and its progeny, and found the evidence to be irrelevant and inadmissible, and to be so prejudicial as to require a new trial. Accord, Fulton v. State, 523 So.2d 1197 (Fla. 2nd DCA 1988). The error here was also prejudicial in the penalty phase. At the very least, resentencing with a new jury is required.[45]

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[45] Capital sentencing proceedings call for a unique standard of reliability pursuant to the Eighth and Fourteenth Amendments and Article I, Section 17 of the Florida Constitution. It is also clear that guilt phase errors can be harmless in the guilt phase, and harmful in the penalty phase. Magill v. Dugger, 824 F.2d 879, 888-889 (11th Cir. 1987). (Counsel's ineffective assistance at guilt phase harmless there, but harmful in penalty phase).

The allegation of extraneous violence undermined one of the most significant non-statutory mitigating factors in this case, Mr. Bruno's lack of prior

9. APPELLANT WAS DENIED DUE PROCESS OF LAW AND THE PRESUMPTION OF INNOCENCE BY REPEATED TESTIMONY ABOUT HIS ARREST AND JAIL STATUS.

The jury was permitted to hear repeated testimony about Mr. Bruno's arrest and his jail status, highlighted by the highly improper prosecutorial argument playing on this testimony. This testimony and argument constituted fundamental error and denied Mr. Bruno due process of law and violated 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.

Testimony or argument which "impermissibly suggests that the State of Florida feels that appellant was guilty" is fundamental error. Ryan v. State, 457 So.2d 1084, 1090 (Fla. 4th DCA 1984). See also, Buckhann v. State, 356 So.2d 1327, 1328 (Fla. 4th DCA 1978); United States v. Phillips, 664 F.2d 971 (5th Cir. 1981). Reference to a defendant's jail status is improper, as it erodes the presumption of innocence. Estelle v. Williams, 425 U.S. 501, (1976). The fact of a person's arrest is normally irrelevant. Postell v. State, 398 So.2d 851, 855 n.7 (Fla. 3d DCA 1981).

Here, the prosecutor brought out the fact that Mr. Bruno had been arrested six times, through four different witnesses. He brought out that Mr. Bruno was in jail through two different witnesses. Sharon Spalding-Maheu testified Mr. Bruno had been arrested. R 453. Steven Mazzella testified to the same fact. R 472. Detective Hanstein testified on two different occasions to this. R 499, 503. Detective Edgerton also testified to the arrest twice. R 616, 617.

Mr. Bruno's jail status was also a subject of much testimony. The prosecutor asked Steve Mazzella whether he had visited Mr. Bruno "in jail." R 472. Detective Edgerton also testified that he placed Mr. Bruno "in a holding cell." R 621. Mr. Bruno's jail status was improperly emphasized in violation of Estelle v. Williams. The prosecutor used this improper evidence to contrast Mr. Bruno's arrest and incarcerated status with the failure to charge any of the Spaldings, or Michael Bruno, Jr. R 708, 721. The improper evidence and argument, individually and cumulatively deprived Mr. Bruno of the presumption of innocence, which is "the foundation of the administration of our criminal law."

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violence. There was considerable unrebutted evidence of Mr. Bruno's non-violence. R 791, 798. The jury may have ignored this evidence or given it less weight than it deserved due to this improper evidence. This was prejudicial, given the jury's recommendation of the death sentence by a narrow eight-four vote. R 913.

Coffin v. United States, 156 U.S. 432, 453 (1895). Reversal is required, even under a fundamental error standard.[46]

10. THE SUBMISSION OF THE CASE TO THE JURY WITHOUT THE PRESENTATION OF A DEFENSE CASE REQUIRES A NEW TRIAL FOR APPELLANT.

After the state rested, there was discussion whether the defense would present evidence. Defense counsel told the court that Mr. Bruno wanted "to put some evidence on from some other witnesses." R 655. Counsel shared with the court his own opinion that he did not wish to present these witnesses because they would "be detrimental to his case." R 655-656. After discussion whether Mr. Bruno would testify, the trial court told Mr. Bruno that if he presented the testimony of the other witnesses he would be penalized by losing the right to make the final argument to the jury. R 659. Counsel then shared with the court his "professional conclusion" that the witnesses' testimony was "such that they would not contribute to the defense's case to the extent that would justify losing the strategic opening and closing argument." R 660. He went on to share that he felt the witnesses (some of whose names "escape me at this particular point") "could be effectively cross-examined and more importantly as to whether they would have anything to add to the defense's case in chief." Id. Accordingly, defense counsel shared with the court, "it is a strategic decision on my part, and I have indicated to Mr. Bruno". Id. Unmindful that the issue before the court was the defendant's constitutional right to present a defense rather than a future claim of ineffective assistance of counsel, the court gave counsel a brief recess, then the defense rested without presenting evidence.

Appellant submits the foregoing violated his right to present a defense under Article I, Sections 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. He argues first that he did not waive his right to present evidence and second that the rule penalizing him for presenting defense evidence is unconstitutional. Hence, the submission of this cause to the jury without the presentation of defense evidence was error. The error requires reversal of Mr.

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[46] The emphasis of Appellant's jail status was also prejudicial in the penalty phase. It implied that Mr. Bruno had been denied bond and thus was a dangerous person. This could lead the jury to believe that the death penalty is the only appropriate sentence. Elledge v. Dugger, 823 F.2d 1434, 1450-1451 (11th Cir. 1987). Even if retrial is not required, a resentencing is to meet the unique reliability concerns of the Eighth Amendment and Article I, Section 17.

Bruno's convictions and sentences.

1. While noting esteem for defense counsel the court failed to note the fact that appellant was being denied his express desire to present his alibi witnesses and his apparent desire to testify on his own behalf. The right to present defense evidence is essential to due process. E.g. Chambers v. Mississippi, 410 U.S. 284 (1973). The waiver of a fundamental constitutional right must be made personally by the defendant rather than through counsel.[47] Similarly, the waiver of such a right cannot be inferred from a silent record.[48] Courts must indulge every presumption against waiver of fundamental constitutional rights. Johnson v. Zerbst, 3094 U.S. 458 (1938). At bar, appellant's assertion of his right to present evidence was simply ignored by the trial court. Since there was no waiver of the right,[49] the trial court erred by submitting the case to the jury without presentation of the defense case.

2. Mr. Bruno was discouraged from exercising his constitutional right to present evidence by operation of rule 3.250, Florida Rules of Criminal Procedure. Rule 3.250 penalizes a defendant who presents testimony other than his own by preventing him from making the concluding argument to the jury.

The Sixth and Fourteenth Amendments guarantee to the accused the right to present the testimony of witnesses. E.g. Pennsylvania v. Ritchie, 107 S.Ct. 989, 1000, n.13 (1987). Restrictions on this right are constitutional only if they further other legitimate interests in the criminal trial process and are not arbitrary or disproportionate to the purpose they are designed to serve. See Rock v. Arkansas, 107 S.Ct. 2704, 2711 (1987). Under Florida law the right to make the concluding argument to the jury is of such force that its improper denial constitutes reversible error as a matter of law. Raysor v. State, 272

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[47] See, e.g., Williams v. State, 440 So.2d 1290 (Fla. 4th DCA 1983) (right to jury trial), and Francis v. State, 413 So.2d 1175 (Fla. 1982) (right of defendant to be present at all critical stages of his trial).

[48] See, e.g., Boykin v. Alabama, 395 U.S. 238, (1969) (guilty plea), and Barker v. Wingo, 407 U.S. 514, 529 (1972) (jury trial, silence, and counsel).

[49] Even if one were to concede this right could be waived by counsel, the concession would not prevent reversal at bar. Defense counsel asserted that he and appellant were in conflict on this point, so counsel was not in a position to waive the right on Mr. Bruno's behalf. See the discussion in Johnson v. Wainwright, 778 F.2d 623, 628 (11th Cir. 1985) (defense counsel arranged to have defendant removed from courtroom).

So.2d 867 (Fla. 4th DCA 1973). As a general rule, a penalty for exercising a constitutional right is unconstitutional as violative of due process because it cuts down on the privilege by making its assertion costly.[50]

Here, defense counsel and appellant were compelled to enter the procedural penalty under rule 3.250 into the weighing process in deciding whether to present evidence.[51] R 660. The trial court specifically advised appellant of the penalty. R 659. The operation of the rule thus burdened the decision (if in fact a decision was made) whether to exercise the right. The rule cut down on the right to present evidence by making it costly. So, even if appellant had waived the right, the waiver would not be valid.[52]

3. The harmless error rule does not apply where, as here, appellant has been denied his right to present evidence. Rose v. Clark, 478 U.S. 570, 578 (1986) (harmless-error analysis presupposes a trial at which the defendant is afforded the right to present evidence). This Court should order a new trial.[53]

11. THE PROSECUTOR'S CLOSING ARGUMENT AT GUILT PHASE DEPRIVED MR. BRUNO OF A FAIR TRIAL AND IS FUNDAMENTAL ERROR.

An improper remark to the jury "can be said to be so prejudicial to the rights of an accused that neither rebuke nor retraction can eradicate its evil influence, [and] it may be considered as ground for reversal even in the absence

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[50] Griffin v.California, 380 U.S. 609, 614 (1965) (comment on silence). See also Brooks v. Tennessee, 406 U.S. 604, 610-11 (1972) (rule requiring defendant to testify first in defense or not at all violates right to "guiding hand of counsel").

[51] Admittedly defense counsel did not make this argument, but as already noted, defense counsel was in conflict with Mr. Bruno so he was not in a position to argue the issue on his behalf. In any event, the contemporaneous objection rule does not prevent a constitutional challenge to a statute for the first time on appeal. See Trushin v. State, 425 So.2d 1126 (Fla. 1982). That principle should apply to this issue.

[52] In making this argument, appellant is not unmindful of Justice McCain's opinion for the court in Preston v. State, 260 So.2d 501 (Fla. 1972), upholding rule 3.250 against a similar attack. He submits, however, that Preston is incorrect.

[53] The trial of this cause without a defense case violated Mr. Bruno's constitutional right to great reliability in fact-finding in capital cases under, e.g., Elledge v. State, 346 So.2d 998 (Fla. 1977) and Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir. 1982). Hence appellant's conviction and sentences should be reversed for that reason also.

of an objection."[54] Pait v. State, 112 So.2d 380,385 (Fla. 1959). Accord, Clark v. State, 363 So.2d 331, 333 (Fla. 1978) (fundamental error is that which "goes to the heart of the case" or the "merits of the cause of action."). After a brief relatively unobjectionable discussion of the facts, R 699-703, the theme of the prosecutor's argument turned to an unprofessional and unconstitutional attack on "the heart" of the defense case. There was a barrage of comments which belittled the defense and defense counsel, misstated the law, expressed personal opinion of Mr. Bruno's guilt on behalf of the prosecutor and other governmental offices, and in the course of it all, a little unsworn testimony on the prosecutor's part to provide the jury with facts which were nowhere near the record. These were not "a few brief sentences in the prosecutor's long ... closing argument", Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974), but a driving diatribe that was "quite focused, unambiguous and strong." Caldwell v. Mississippi, 105 S.Ct. 2033, 2642 (1985). This is what the prosecutor wanted the jury to think: 1) the law would only permit them to find Mr. Bruno guilty, and 2) the State of Florida had already done that job for them, anyway. This is how he did it:

Not content to prove his case the legal way, the prosecutor spiked the evidence with his own version of nonrecord facts. In the course of belittling defense counsel, R 703,704,705, and the defense that another person might have killed Mr. Merlano, the prosecutor "testified" to this:

> And Mr. Stella keeps saying things like when the Defense investigations revealed that Jody and the Defendant's son were involved. Defense investigation. This Defense investigation, what it revealed was in the deposition Mr. Stella asks accusatory questions like didn't you do it?
>
> That's the Defense investigation that revealed it.

R. 705. The prosecutor said this to jurors who considered him to speak for the State of Florida. "[C]onsequently, improper suggestions, insinuations and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Berger v. United States, 295 U.S. 78, 88 (1935). See also, United States v. Young, 470 U.S. 1

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[54] "Otherwise stated, one 'cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound'; and finally, 'if you throw a skunk in the jury box, you can't instruct the jury not to smell it.'" Dunn v. United State, 307 F.2d 883, 886 (5th Cir. 1962) (discussing the standard for "plain error" under the federal rules).

(1985). Reference to matters outside the record have been held as cause for reversal as fundamental error. Duque v. State, 460 So.2d 416, 417 (Fla. 2d DCA 1984), Ryan v. State, 452 So.2d 1084, 1089-90 (Fla. 4th DCA 1984).

Not content to demean the defense[55] by letting the jury know his own beliefs, the prosecutor asked the jury to trust the system's decision that Mr. Bruno was the perpetrator:

> And he says well, why weren't these other people charged with [a] crime. You want me to charge Jody Spalding with a crime? You want me to charge Sharon Spalding with a crime? They knew they had some stolen property there, and they kind of helped the defendant after it happened, but they don't deserve to be charged. The Police didn't think so. I didn't think so. The grand jury indicted that man.

R 708. (emphasis supplied). The prosecutor later said the "Police never thought they did the murder. No one thought they did the murder .... They knew [Bruno, Jr.] didn't commit the murder. They let him go." R 721. Comments which "impermissibly suggest that the State of Florida feels that appellant was guilty..." are fundamental error. Ryan v. State, 457 So.2d at 1090 (among others). See also, Buckhann v. State, 356 So.2d 1327, 1328 (Fla. 4th DCA 1978), and United States v. Phillips, 664 F.2d 971 (5th Cir. 1981).[56]

Gone with his wind were the presumption of innocence, burden of proof, and the right to trial by jury. The remarks went to the "heart" of Mr. Bruno's primary defense: that one or more of the state witnesses, who were unquestionably involved in drug-dealing with Lionel Merlano, and with access to the key to his apartment, committed the crime. The comments standing alone were "patently improper", and "a flagrant violation of the moral, legal and ethical duty of a state prosecutor...," Walker v. State, 473 So.2d 694, 697 (Fla. 1st DCA 1985), and should be cause for reversal. But there were more.

Consistent with his theme of denigrating defense counsel for arguing a defense, the prosecutor referred to the extra-record arguments of other attorneys:

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[55] A separate reversible argument. Ryan, 457 So.2d at 1989.

[56] The reason why telling the jurors the police, prosecutor and grand jury had fingered only Mr. Bruno deprived him of a fair trial is crystal-clear: "The remark is at the least, an effort to lead the jury to believe that the whole governmental establishment had already determined appellant to be guilty on evidence not before them." Hall v. United States, 419 F.2d 582, 587 (5th Cir. 1969) (conviction reversal due to prosecutorial misconduct).

> And where are the fingerprints? The eternal question of defense attorneys, where are the fingerprints?

R 706. Reference to argument as "an old defense trick" is improper. Cooper v. State, 413 So.2d 1244, 1245 (Fla. 1st DCA 1982). The prosecutor sprinkled his argument with contentions that the jury should find Mr. Bruno guilty because his attorney had raised apparently inconsistent defenses.[57] Finally, the prosecutor repeatedly and grossly understated the state's burden of proof on the issue of premeditated murder where self-defense is in issue. Countering the self-defense issue raised on cross of the medical examiner, and by Mr. Bruno's statement, the prosecutor improperly argued:

> This case is truly overwhelming. If we just had two facts one, the fact of the death in the statement, plus the defendant's statement to the police that I am the one who killed him, even though he is saying self-defense, that proves the case beyond a reasonable doubt of murder one against this man. That would be a very strong case.

R 709 (emphasis supplied). See also, R 715. "While the defendant may have the burden of going forward with evidence of self-defense, the burden of proving guilt beyond a reasonable doubt never shifts from the state, and this standard broadly includes the requirement that the State prove that the defendant did not act in self-defense beyond a reasonable doubt." Brown v. State, 454 So.2d 596, 598 (Fla. 5th DCA 1989); Bolin v. State, 297 So.2d 317 (Fla. 3d DCA), cert. denied, 304 So.2d 452 (Fla. 1974). Both Mr. Bruno's statement, describing a dispute then an escalating scuffle leading to the killing, and the medical examiner's testimony that he could not say Mr. Merlano was not an aggressor, fairly placed justifiable homicide in issue. In Harvey v. State, 448 So.2d 578 (Fla. 5th DCA 1984), the prosecutor argued an improper standard for finding Mr. Harvey guilty of operating a gambling house. There was no objection to this argument or to the trial judge's misleading instruction on the issue, but these errors, combined with the jury's confusion were a sufficient basis for fundamental error. Id. at 581. So it is is here.

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[57] "And how can he have it both ways?" R 709; "I don't know what he's [defense counsel] saying" R 713; "well, what is their defense? I have listened to Mr. Stella cross-examining these witnesses and his closing argument, and I'm still not sure what the defense is." R 714-15; "that was their defense for awhile. It didn't work. Now it's a different defense" R 715; "Well, there is no real defense,.... It's called a shotgun defense, just sort of hit everything a little bit because there is no theory of defense." R 716; "I'll give you an example of that disspection to find a defense here." T. 716; "... which shows you how desperate he is to make a defense here." R. 717.

12. THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN ITS INACCURATE JURY INSTRUCTIONS.

The trial court gave erroneous jury instructions and failed to give legally required jury instructions concerning excusable homicide, justifiable homicide, and manslaughter. There was no objection to these erroneous instructions, but individually and cumulatively, they denied Appellant due process of law and a fair trial, 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 excusable homicide instructions were inaccurate and incomplete. The only instructions given concerning excusable homicide were as follows:

> 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.

R 734, 1049.

This instruction is inaccurate. The courts have consistently held that the phrase "without any dangerous weapon" is misleading and can lead a jury to believe that excusable homicide can not exist where there is a dangerous weapon involved. Kingery v. State, 502 So.2d 1199 (Fla. 1st DCA 1988); Young v. State, 509 So.2d 1339 (Fla. 1st DCA 1987); Ortagus v. State, 500 So.2d 1367 (Fla. 1st DCA 1987); Blitch v. State, 427 So.2d 785 (Fla. 2d DCA 1983); Bowes v. State, 500 So.2d 290 (Fla. 3d DCA 1986).

The instruction was also erroneous in that it failed to give the "long form" excusable homicide instruction set out in Florida Standard Jury Instructions In Criminal Cases, Excusable Homicide. Specifically, the Court erred in not giving the following instruction:

> 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, supra at 1205-1206; Bowes, supra at 291. Reversal has been consistently ordered.

The trial court's instructions on justifiable homicide were inaccurate in that they did not clearly explain defense of another as self defense. The initial instructions on justifiable homicide contain no mention of this. R 734, 1049.

The court later gave longer instructions on this issue containing only one brief mention of defense of another. R 745-748; 1058-1059. The thrust of the instruction only deals with self-defense, to the exclusion of defense of another. Bagley v. State, 119 So.2d 400 (Fla. 1st DCA 1960), holds the failure to instruct on defense of another to be fundamental error.

The court's instruction on manslaughter is also erroneous R 739, 1056, completely leaving out the portion of the manslaughter instruction that if the killing is justifiable or excusable it is not manslaughter. See Hedges v. State, 172 So.2d 824 (Fla. 1965). This instruction was also wrong in that it did not define justifiable and excusable homicide in conjunction with manslaughter. Ortagus v. State, 500 So.2d 1367 (Fla. 1st DCA 1987). Failure to give the long form excusable homicide was also error.Alejo v. State, 483 So.2d 117 (Fla. 2d DCA 1986). Thus, the jury instructions were erroneous on several grounds.[58]

The manslaughter instruction was completely deficient in failing to explain that manslaughter is a residual offense, excluding justifiable and excusable homicide. Mr. Bruno's statement raises this possibility of this killing being manslaughter. A properly instructed jury may well have construed

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[58] The erroneous jury instructions were prejudicial. The state introduced Mr. Bruno's police statement. First Supp. R. 1-17. The thrust of the statement is that Merlano started "getting loud" with Mike, Jr., and when Mr. Bruno stepped in, Merlano started "poking" at him. A fist fight ensued. Mr. Bruno hit Merlano with a crowbar. After Merlano kneed Mr. Bruno between the legs, Merlano went to his bedroom, returning with a gun. The fight continued, Mr Bruno wrestled the gun from Merlano, and shot him in the head. First Supp. R. 7-10. Mr. Bruno's police statement introduced by the state raised questions of excusable homicide, justifiable homicide, or manslaughter. The inaccurate jury instruction on a dangerous weapon was prejudicial as it precluded excusable homicide. This error was exacerbated by the failure to give a complete instruction including the "heat of passion brought on by sudden provocation." This would fit the portion of the statement concerning Merlano's verbal harassment of Michael Bruno, Jr. and Mr. Bruno, and the physical attack of Mr. Bruno. The failure to clearly instruct on defense of another is damaging since Mr. Bruno's statement is evidence he may have been defending his son.

Mr. Bruno's actions as an unnecessary killing in reaction to a perceived threat and thus manslaughter. See Cobb v. State, 376 So.2d 230 (Fla. 1979).

The errors in the jury instructions individually and cumulatively denied Mr. Bruno a fair trial, even under a fundamental error standard.[59]

13. APPELLANT WAS DENIED HIS RIGHT TO BE PRESENT AT SEVERAL STAGES OF THE PROCEEDINGS.

Mr. Bruno was absent during at least three points in the proceedings. Mr. Bruno was not present at his arraignment, Second Supp.R. 6-7, at the Trial Call and Motion to Continue held on October 17, 1986, Second Supp.R at 8-9, and when it was determined how to respond to jury questions. R 761-762, Second Supp. R. 172-173. This denied him due process of law and the effective assistance of counsel pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitutions, and rules 3.180, 3.400, and 3.410, of the Florida Rules of Criminal Procedure.

Mr. Bruno's absence violated rule 3.410, Florida Rules of Criminal Procedure. Such violations are per se reversible error. Ivory v. State, 351 So.2d 26 (Fla. 1977). In Curtis v. State, 480 So.2d 1277 (Fla. 1985) this Court wrote:

> Both the state and the defendant must have the opportunity to participate, regardless of the subject matter of the jury's inquiry.

480 So.2d at 1279 (emphasis supplied). [60], [61]

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[59] Bagley, held failure to instruct on defense of another to be fundamental error. In Smith v. State, 14 F.L.W. 561 (Fla. 2d DCA Feb. 26, 1989) the court rejected the contention that the erroneous "dangerous weapon" instruction is fundamental error, but certified the question to this Court. Failure to give a complete instruction in connection with manslaughter has been held to be fundamental error. Smith; Alejo v. State, 483 So.2d 117 (Fla. 2d DCA 1986).

[60] Appellant recognizes this Court has held that counsel's presence is adequate, Meek v. State, 487 So.2d 1058 (Fla. 1986), but contends Meek is wrongly decided and in conflict with Curtis. A defendant's presence is required in aiding his attorney in how to advise the judge in answering jury questions. A defendant may have a different recollection of the evidence than his counsel. His participation would be very helpful. Additionally Meek did not involve the imposition of the death penalty with the unique need for reliability required by the Eighth Amendment and Article I, Section 17.

[61] Appellant is aware that rule 3.160(a), Florida Rules of Criminal Procedure allows for a defendant's absence at arraignment if a written plea of not guilty is entered. This rule violates defendant's right to be present under the United States Constitution. Snyder v. Massachusetts, 291 U.S. 97, (1934); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). This is especially true in a capital case, involving Eighth Amendment concerns.

In a capital case a defendant's right to be present is not waivable.[62] Assuming arguendo, that presence can be waived, it must be knowingly and intelligently waived by the defendant. Here there was no waiver whatsoever. Appellant's conviction must be reversed and remanded for a new trial due to his absence at three different critical stages of the proceedings. Francis v. State, 413 So.2d 1175 (Fla. 1982).

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

The bailiff was permitted to respond to a substantive jury request without the judge, Mr. Bruno, or defense counsel present, and without Mr. Bruno waiving his, his attorney's or the judge's presence. The judge pre-approved the procedure:

> Gentlemen, in the event that the jury should request the evidence, do you wish me to reconvene the court or can Frank (the bailiff) just give it to them?
>
> MR. STELLA (Defense Counsel): Frank can give it to them.
>
> THE COURT: If they request any part, they get it all.
>
> MR. STELLA: That's fine.
>
> THE COURT: One additional question is if they request the evidence obviously there will have to be a machine. Do we have a machine they can play the tape on?
>
> MR. COYLE: Yes, sir.
>
> THE COURT: Do you gentlemen agree in the event that they should require technical assistance that Frank can demonstrate the tape machine?
>
> MR. STELLA: That's fine.

R 760-761.

While both the judge and defense counsel counsel pre-approved this procedure, Mr. Bruno never personally waived his right to be present, his counsel's right to be present, or the judge's presence.

Subsequently, the jury did ask for some of the evidence (taped statement and pictures) and "the transcript." Second Supp.R. 172-173. The trial judge's subsequent colloquy shows that the bailiff did deal with the jury's request for evidence without anyone else's presence. R 762-63.

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[62] Diaz v. United States, 223 U.S. 442, 455, (1912); Hopt v. Utah, 110 U.S. 574, 579, (1884); Near v. Cunningham, 313 F.2d 929, 931 (3d Cir. 1963); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982).

This issue involves three separate legal errors. (1) The denial of Mr. Bruno's right to have a judge present. (2) The denial of Mr. Bruno's right to be present. (3) The denial of his right to have counsel present. This procedure violated Mr. Bruno's right to due process of law, effective assistance of counsel and to a fair trial, by an impartial jury, pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution, the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and rules 3.180, 3.400, and 3.410, of the Florida Rules of Criminal Procedure.

This Court recently discussed the issue of a judge's absence from proceedings in Brown v. State, 14 FLW 53 (Fla. Feb. 2, 1989). There the prosecutor, defense counsel, and the judge agreed how to answer a jury question concerning transcripts. Defense counsel specifically waived the judge's presence at the actual answering of the questions. This Court held that a judge's presence can not be waived when there are communications with the jury. Id. at 54. This Court also held that even in proceedings where a judge's presence is waivable, there must be a personal waiver by the defendant, not merely by counsel. In the present case, there was no judge present when the bailiff gave the jury evidence in response to two of its three questions. As in Brown, the judge's presence was necessary and non-waivable. Assuming the judge's presence could have been waived, it could only have been by Mr. Bruno personally.

This procedure was also improper in that Mr. Bruno was not present when the bailiff responded to the requests. A defendant has a right to be present at all proceedings pursuant to the United States and Florida Constitutions and rule 3.180. In a capital case a defendant's right to be present is not waivable.[63] Assuming that presence can be waived it must be knowingly and intelligently waived by the defendant. Here, the lawyer merely agreed without any consultation with Mr. Bruno. Thus, there can be no proper waiver.

The third error here was the absence of defense counsel when the bailiff answered these questions. Thus, there was no representative of the defense present to make sure this was done properly.

The procedure employed here violated 3.410 which requires that only the

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[63] Diaz v. United States, 223 U.S. 442, 455, (1912); Hopt v. Utah, 110 U.S. 574, 579, (1884); Near v. Cunningham, 313 F.2d 929, 931 (3d Cir. 1963); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982).

judge can give the jury additional materials after deliberation. Direct violation of this rule has been held to constitute per se reversible error.[64]

15. THE TRIAL COURT ERRED IN COMMUNICATING WITH THE JURY WITHOUT ANY PRIOR CONSULTATION WITH DEFENSE COUNSEL OR THE DEFENDANT, ESPECIALLY WHERE SUCH COMMUNICATION WAS DESIGNED TO COERCE THE JURY INTO REACHING A VERDICT.

The trial court gave the jury, sua sponte, a coercive jury instruction, without prior consultation with the parties, and without any indication of deadlock or any other jury problem.[65] R 769. This process denied Mr. Bruno due process of law and effective assistance of counsel 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, rules 3.400, 3.410 and 3.420 Florida Rules of Criminal Procedure, and section 918.10, Florida Statutes (1987).

> THE COURT: Ladies and gentlemen of the jury, according to my calculations, it's been some 26 hours ago that I sent you all back to the jury room.
>
> Since that time we have heard practically nothing from you. I would like to inquire is there some problem that the Court might be of some assistance to you as you deliberate?
>
> MR. GILLIS: Your honor, at at this time. We're coming pretty close.
>
> THE COURT: Okay. I will speak to you again shortly. You may retire.

R 769-770. The judge thus communicated with the jury in a coercive manner without any prior communication with counsel.

The foregoing violated Rule 3.410, and 3.420 which states:

> The court may recall the jurors after they have retired to consider their verdict to give them additional instructions, or to correct any erroneous instructions given them. Such additional or corrective instructions may be given only after notice to the prosecuting attorney and to counsel for the defendant.

This Court has not ruled whether violation of rule 3.420 constitutes per se reversible error. However, the Florida courts have consistently held violation of the two similar rules to be per se reversible. Rule 3.410 forbids

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[64] Bradley v. State, 513 So.2d 112 (Fla. 1987); Williams v. State, 488 So.2d 62 (Fla. 1986); Curtis v. State, 480 So.2d 1277 (Fla. 1985); Ivory v. State, 351 So.2d 26 (Fla. 1977).

[65] Appellant concedes there was no objection. However, there was no opportunity to object as the trial judge acted sua sponte. Objection afterward would have been fruitless. This issue should be treated as properly preserved. However, even under a fundamental error standard, reversal is required.

answering a jury question without consulting the parties. Violation of this rule is per se reversible. Bradley v. State, 513 So.2d 112 (Fla. 1987); Curtis v. State, 480 So.2d 1277 (Fla. 1985); Ivory v. State, 351 So.2d 26 (Fla. 1977). The policy considerations underlying rules 3.410 and 3.420 are identical. There is the same need to participate and make full argument concerning the exact nature of the judge's communication.[66]

Judicial comments designed to coerce a verdict are improper. Nelson v. State, 438 So.2d 1060 (Fla. 4th DCA 1983); Kozakoff v. State, 323 So.2d 98 (Fla. 4th DCA 1975). In some cases this error rises to the level of fundamental error, requiring reversal without objection. Warren v. State, 498 So.2d 472 (Fla. 3d DCA 1986); Rodriquez v. State, 462 So.2d 1175 (Fla. 3d DCA 1985). In the present case, the trial judge made the comments without prior consultation as required by rule 3.420, and without any indication of any jury problem.

Mr. Bruno's conviction must be reversed and a new trial ordered.

B. Penalty Phase Claims

1. THE SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, ARTICLE I, SECTIONS 9, 16, AND 17 OF THE FLORIDA CONSTITUTION, AND SECTION 921.141, FLORIDA STATUTES (1986).

a. The trial court's sentencing findings are incorrect as a matter of law or not supported by the record.

The trial court found six aggravating factors, though specifically considering "B" (prior violent felony), "D" (felony murder) and "E" (witness elimination), as one aggravator because they "are based on the same aspect of the criminal episode," R 1106, leaving only four.[67] None of the aggravating circumstances found by the trial court are appropriately found in this case under section 921.141 Florida Statutes, and the cases construing it, or the Eighth Amendment.

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[66] The communication was definitely prejudicial as it coerced the jury to reach a verdict. The trial court emphasized the length of time which the jury had deliberated. R 769. The court went to emphasize how there had been few communications from the jury and asked: "Is there some problem that the Court might be of some assistance to you as you deliberate? R 769. The foreperson of the jury took the judge's comments as they were intended, i.e., pushing the jury towards a verdict, telling him: "we're coming pretty close." R 769. The judge's response that "I will speak to you again shortly", R 770, left the jury with an impression that a verdict was required soon.

[67] The death sentencing order says that leaves three aggravating circumstances, R 1107, but careful addition reveals four.

(i) Prior Violent Felony

The sentencing court's use of the contemporaneous robbery and murder convictions to find a prior violent felony, R 1105, was error, and the aggravating factor must be stricken. There was one victim and the stereo equipment was taken from his apartment well after the killing, according to testimony and the state's theory. This Court has held that it is "improper to aggravate for a prior conviction of a violent felony when the underlying felony is part of the single criminal episode against the single victim for which the defendant is being sentenced." Lamb v. State, 532 So.2d 1051, 1053 (Fla. 1988), quoting, Perry v. State, 522 So.2d 817, 820 (Fla. 1988). Accord, Wasko v. State, 505 So.2d 131 (Fla. 1987).

(ii) Robbery Murder

To find this circumstance, the trial judge relied solely on the robbery conviction. As shown at Section IV A(2), that conviction cannot stand for lack of evidence. Hence there is insufficient evidence to prove this aggravating factor See Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988).

(iii) Avoid Arrest

The sentencing order offers no clue why this aggravating circumstance applies; it says only that it does. R 1106. Even the state suggested this circumstance was inapplicable, by not arguing it to the jury, see R 883-894, and so conceding at the sentencing hearing. R 950.[68] It is clearly not an appropriate factor upon which a death sentence may be based in this case. The sentencing court could have found from the testimony that the victim knew and could identify the appellant, but ability to identify is not sufficient to prove this aggravating factor. Floyd v. State, 497 So.2d 1211, 1215 (Fla. 1986); Bates v. State, 465 So.2d 490 (Fla. 1985); Caruthers v. State, 465 So.2d 496 (Fla. 1985). This Court has been careful to restrict the avoid arrest/effect escape aggravation to very specific scenarios, and this case is not one of them.

Unless the victim was a law enforcement officer, and Lionel Merlano was not, the State must present "clear proof beyond a reasonable doubt that the

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[68] In fact, the only participant in the sentencing process who concluded the circumstance was present (besides Judge Coker) was the officer of the Department of Corrections who determined that it applied in her Pre-Sentence Investigation Report. First Supp. R., V.II, P. 70.

killing's dominant or only motive was the elimination of a witness." Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), citing, Riley v. State, 366 So.2d 19 (Fla. 1978) and Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979). Accord, Scull v. State, 533 So.2d 1137, 1141-42 (Fla. 1988) ("proof of intent to avoid arrest or effectuate escape must be very strong in order to support this aggravating factor"). The record suggests no such proof. The state's shifting theories of a motive for the killing posit premeditation (Bruno's delusions about Merlano's supposed conduct in Viet Nam), robbery (the stereo), or that it was committed for no reason at all. No "witness" to the killing was killed, and in fact Bruno's son was there to give an eyewitness account at trial. The evidence "falls [far] short," Rogers, Id. at 533, of the "clear proof" requirement, and this circumstance, too, must be stricken. See also Garron v. State, 528 So.2d 353, 360 (Fla. 1988) ("true motive" for the killing "unclear", avoid arrest-effect escape finding disallowed).

(iv) Pecuniary Gain

As evidence of robbery is thin, so too is evidence the killing was committed for pecuniary gain. The trial court applied this factor, though, concluding "the Defendant had as a motive for the murder the taking of the victim's stereo equipment." R 1105. The state argued both that theft was and was not a motive alternately when it suited its purpose. Compare R 287, 702, 715, with R 888. There is no direct evidence the taking of the stereo equipment was the reason for the killing. Despite much testimony that Bruno told people he was going to, or had, killed someone, no clear reason why was ever offered.

That leaves as "pecuniary gain" evidence only the following: Bruno a month earlier asked to borrow a car so he could borrow a stereo, he borrowed the car that night to do so, R 409, and he brought pieces of Merlano's equipment over to the Spaldings on subsequent return trips made hours or a day after Merlano's death. R 441, 344, 433. The law requires proof of a pecuniary motivation for the killing beyond a reasonable doubt, and "such proof cannot be supplied by inference from circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the [pecuniary gain] aggravating circumstance." Simmons v. State, 419 So.2d 316, 318 (Fla. 1982).

There is certainly reason to believe the taking of the stereo equipment

was an afterthought. Rogers v. State, 511 So.2d 520 (Fla. 1987) is the flip side of the facts here. In Rogers, the killing took place after the defendant abandoned a robbery attempt, and this Court found pecuniary gain inapplicable "since the killing occurred during flight and thus was not a step in the furtherance of the sought-after gain." Id. at 533. For pecuniary gain to stand, the murder must be "an integral step in obtaining some sought-after specific gain." Hardwick v. State, 521 So.2d 1071 (Fla. 1988). The Court disallowed the pecuniary gain finding in Hardwick, though there was evidence the defendant had demanded the return of quaaludes he thought he had stolen. The Court found such a financial advantage "indirect and uncertain" and struck the circumstance.

In Simmons the defendant expected a new Trans Am car as a fruit of his crime, and he tried to have the victim's property sold. The evidence was insufficient because it failed to prove "a pecuniary motivation for the murder itself beyond a reasonable doubt." Id. at 318. See also Spivey v. State, 529 So.2d 1088, 1095 (Fla. 1988), vacating the finding of pecuniary gain, though the defendant was convicted of robbery-murder, because "there was a reasonable basis for the jury to conclude Spivey did not commit a contract murder." Id. at 1095.

This circumstance must be stricken.

(v) The trial court erred in finding the killing was heinous, atrocious or cruel.[69]

The trial court's explicit reliance on improper and unfounded considerations in finding HAC is reason enough to reverse. Judge Coker found "the Defendant not only performed these acts in front of his 15 year old son, but persuaded his son to assist by handing him the gun, which makes this murder especially wicked and evil." R 1105. There is no difference between this finding of HAC and the one stricken in Riley v. State, 366 So.2d 19 (Fla. 1978). There the trial judge found HAC in part because of "the son's having to see his father's execution death." Id. at 23. This Court held the focus should be on the "atrocity" to the victim. The rationale that HAC looks only to the victim's suffering, followed in subsequent cases, see, e.g., Clark v. State, 443 So.2d 973, 977 (Fla. 1979), was disregarded here.

To buttress its finding on the "especially atrocious or cruel" prong, the

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[69] The aggravating circumstance "heinous, atrocious or cruel", is referred to as "HAC" or "heinous" in this brief.

trial court found "the victim had self-defense wounds on his hands and the Defendant continued the savage beating until the victim was no longer capable of resisting." R 1105. The brutal picture painted by the trial court of a victim trying to defend himself against attack, only to be wounded and ultimately overcome, appears as a frequent factor recited by this Court to find HAC applies.[70] But it is entirely unsupported by the evidence at trial. The medical examiner could not determine whether the deceased's hand wounds were defensive. R 544-45; 548. There is no other evidence on this point. The judge improperly substituted his opinion for that of the state's expert.

Neither do the other circumstances of the killing make it "so unnecessarily torturous, conscienceless or pitiless to set the crime apart from the norm of capital felonies." Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988) (citing State v. Dixon, 283 So.2d 1, 9 (Fla. 1973)). "This aggravating factor generally is appropriate when the victim is tortured, either physically or emotionally, by the killer." Cook v. State, 14 FLW 187, 189 (Fla. Apr. 6, 1989). There was no torture here.

Like many capital cases, this one falls in the gray zone between a clear HAC and no HAC finding. On balance a look at the peculiar circumstances surrounding this offense, many not considered by the trial court, counsel a finding that the killing was not "heinous, atrocious or cruel."

The killing did not carry with it the hallmark factors which traditionally identify a heinous, atrocious or cruel crime. It did not involve strangulation,[71] stabbing,[72] throat-slitting,[73] asphyxiation,[74] or drowning.[75] The deceased was not

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[70] See Grossman v. State, 525 So.2d 833,840-41 (Fla. 1988); Roberts v. State, 510 So.2d 885, 894 (Fla. 1987); Floyd v. State, 497 So.2d 1211, 1214 (Fla. 1986); Wilson v. State, 493 So.2d 1019 (Fla. 1986); Heiney v. State, 447 So.2d 210 (Fla. 1984).

[71] Johnson v. State, 465 So.2d 499 (Fla. 1985); Doule v. State, 460 So.2d 353 (Fla. 1984).

[72] Michael v. State, 437 So.2d 138 (Fla. 1983); Bundy v. State, 455 So.2d 330 (Fla. 1984) (victim bludgeoned and strangled).

[73] Card v. State, 453 So.2d 17 (Fla. 1984).

[74] Perry v. State, 522 So.2d 817 (Fla. 1988) (victim beaten, stabbed, choked to death on her own blood).

[75] Waterhouse v. State, 429 So.2d 301 (Fla. 1983) (victim sexually battered, cut, then left to drown).

raped,[76] or subjected to an "unusual" death such as being buried alive,[77] or suffer slow death by poisoning.[78] Lionel Merlano died from a gunshot wound to the back of the head, after having been beaten about the head and shoulders with (according to the state) a crowbar. The entire incident happened very quickly, from start to finish. Had there simply been an unforeseen gunshot wound to the back of the head, the resulting instantaneous death would not qualify as heinous, atrocious, or cruel, See Amoros v. State, 531 So.2d 1256, (Fla. 1988), Raulerson v. State, 420 So.2d 561, (Fla. 1982). But here the bullets were preceded by a beating, severe enough, the medical examiner testified, that wounds from it alone would have resulted in death in a matter of hours. R 535. There have been cases where even beating deaths standing alone, have not resulted in a finding of HAC.[79] Beyond that, there are factors surrounding this killing which make it fall without the confines of heinous, atrocious or cruel.

First, the deceased's pain was dulled and his ability to conceive that he may be about to die was impaired because he was legally intoxicated at the time of the killing. The medical examiner testified Merlano's blood alcohol level was .16 at the time he was killed, the equivalent of eight drinks or beers. R 547.[80] That is half again as much Florida's legal standard for intoxication. §316.1934-(2)(c), Fla. Stat. (1986). In Herzog v. State, 439 So.2d 1372, 1380 (Fla. 1983), this Court found a victim's semi-conscious state during the killing which was induced by her use of methaqualone, precluded a finding of HAC. See also Scott v. State, 494 So.2d 1134 (Fla. 1986) (HAC approved where victim regained consciousness at some point during the attack). The same state produced by

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[76] Waterhouse, supra; Smith v. State, 424 So.2d 726 (Fla. 1983).

[77] Roman v. State, 475 So.2d 1228 (Fla. 1985)

[78] Buenoano v. State, 527 So.2d 194 (Fla. 1988)

[79] Scull v. State, 533 So.2d 1137 (Fla. 1988) (single blow to the head resulted in death); Rembert v. State, 445 So.2d 337 (Fla. 1984) (elderly victim died several hours later of severe head injuries from one or two blows to the head); Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975) ("Appellant grabbed a 19-inch breaker bar and beat the husband's skull with lethal blows and then continued beating, bruising and cutting the husband's body with a metal bar after the first fatal injuries to the brain ... we see nothing more shocking in the actual killing than in a majority of murder cases reviewed by this Court."). But see, Cherry v. State, 544 So.2d 184 (Fla. 1989)

[80] Narcotics paraphernalia was found in the apartment, but the record shows no effort to test for the presence of other drugs in his system.

alcohol intoxication likewise precludes a finding of HAC. Rhodes v. State, 14 FLW 343 (Fla. July 6, 1989).

Second, even if Merlano knew he was going to die, that awareness was not for any significant period of time. It could only have come from hearing Bruno tell his son to get the gun, which he quickly did. Even if a victim has knowledge he is about to die, this Court has held HAC does not apply where the knowledge is for a short time, and the victim is not intentionally kept waiting for his death.[81] Merlano was not helplessly tortured for hours, and had no clear knowledge of impending death through taunts, threats, or the like. cf Parker v. State, 476 So.2d 134 (1985); Thompson v. State, 389 So.2d 187 (Fla. 1980).

A number of factors this Court has looked to in finding HAC are absent from the circumstances of this killing. The additional terror associated with being accosted by a stranger is not present.[82] Merlano knew Bruno, but the two were not blood relatives. Had they been, it would be another factor cited by this Court as heightening the likelihood that the killing would be considered heinous. See Huff v. State, 495 So.2d 145, 153 (Fla. 1986). Merlano was not taken to a remote location to be killed. Abduction and removal to a remote place would contribute to the heinousness of a killing, but it didn't happen here.[83] There have been cases in which the fact that the killing took place in the "supposed safety" of the victims home "adds to the atrocity of the crime." [84] But this is not one of them. As in Simmons v. State, 419 So.2d 316, 319 (Fla. 1982), "the finding that the victim was murdered in his own home offers no

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[81] Brown v. State, 526 So.2d 903 (Fla.), cert. denied, 109 S.Ct. 371 (1988); Phillips v. State, 476 So.2d 194 (Fla. 1985); Parker v. State, 458 So.2d 750 (Fla. 1984); Gorham v. State, 454 So.2d 556 (Fla. 1984); Jackson v. State, 451 So.2d 458 (Fla. 1989); Clark v. State, 443 So.2d 973 (Fla. 1983).

[82] See Scott v. State, 494 So.2d 1134, 1136 (Fla. 1986); Barclay v. State, 343 so.2d 1266, 1269 (Fla. 1077), aff'd, 463 U.S. 939 (1983), sentence vacated on other grounds, 470 So.2d 691 (Fla. 1985).

[83] See e.g. Bryan v. State, 533 So.2d 744, 749 (Fla. 1988) (victim bound and driven to an isolated area, pushed into creek, shot with single shotgun blast); Jackson v. State, 522 So.2d 802, 809 (Fla. 1988); Swafford v. State, 533 So.2d 270, 277 (Fla. 1988); ("In numerous cases the Court has held that this aggravating factor could be supported by evidence of actions of the offender preceding the killing, including forcible abduction, transportation away from possible sources of assistance and detection, and sexual abuse.").

[84] Perry v. State, 522 So.2d 817, 821 (Fla. 1988) (citing Troedel v. State, 462 So.2d 392, 398 (Fla. 1984)), and Breedlove v. State, 413 So.2d 1 (Fla.). cert. denied, 459 U.S. 882 (1982)).

support for the [HAC] finding," because, as in Simmons, the defendant here was invited into the apartment by Merlano himself. The "home as castle" spin on HAC would make no sense if applied to an invited guest. Merlano was not so young or old as to be helpless, another point of reference in determining HAC. See Johnston v. State, 497 So.2d 863, 871 (Fla. 1988).

The testimony of Dr. Stillman indicating Mr. Bruno was suffering an extreme and incapacitating mental illness at the time of the killing precludes a finding it was heinous, atrocious or cruel. "There is frequently a significant connection between the grossness of a homicide and the perpetrator's mental condition." Mann v. State, 420 So.2d 578, 581 (Fla. 1982). Accord, Amazon v. State, 487 So.2d 8 (Fla. 1986) (irrational frenzy lessens heinousness of crime). This crime was not nearly as "gross" as many, but was undeniably attributed to Mr. Bruno's mental illness.

(vi) Cold, Calculated, or Premeditated.[85]

The killing of Lionel Merlano was not cold or calculated, and it was supported by a pretense of moral or legal justification. This factor "ordinarily applies in those murders which are characterized as executions or contract murders...." McCray v. State, 416 So.2d 804, 807 (Fla. 1982). This killing was neither. It had its genesis in a dispute. After years of gradual expansion of this aggravating factor, in Rogers v. State, 511 So.2d 526 (Fla. 1987) this Court has sought to return CCP to its "plain and ordinary meaning," by requiring strict proof the defendant "had a careful plan or prearranged design to kill." Id. at 533. That proof is insufficient here.

There was evidence the weapons were brought to the scene, a factor this Court has held in some cases supports a finding of CCP.[86] But to be faithful to Rogers' promise that CCP is to be narrowed, and its explicit rejection of the reasoning of Herring v. State, 446 So.2d 1049 (Fla. 1984), bringing a gun to the scene cannot alone qualify for the premeditation-plus meaning of the CCP aggravator. Such a broad construction would render CCP useless in narrowing the

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[85] The aggravating circumstance "cold, calculated or premeditated" will be referred to as "CCP" or "premeditated" in this brief.

[86] Swafford v. State, 533 So.2d 270 (Fla. 1988); Lamb v. State, 532 So.2d 1051, 1053 (Fla. 1988); Huff v. State, 495 So.2d 145 (Fla. 1986); Davis v. State, 461 So.2d 67 (Fla. 1985).

class of death-eligible defendants, and violate the Eighth Amendment. cf Maynard v. Cartwright, 108 S.Ct. 1853 (1988). While bringing a weapon to the scene was formerly cited to support CCP, recent cases reverse CCP findings even where the weapon had been brought to the scene.[87]

There is no showing of a "substantial period of reflection and thought", Harmon, or of a contract or execution-style killing, the core kinds of killings to which this factor may only constitutionally apply. Merlano was not taken to a remote location. Compare Bryan v. State, 533 So.2d 744, (Fla. 1988). There is uncontroverted evidence Mr. Bruno was under the influence of drugs and alcohol, suffered schizophrenic-like symptoms, and was insane at the time of the offense. These preclude a finding of heightened premeditation.

There was a pretense of moral or legal justification. Mr. Bruno said he went to inquire about a debt, and a subsequent argument escalated into the killing. While not sufficient to prove a legal defense, this is a "colorable claim" of a moral or legal justification, and that he was acting in self defense. Banda v. State, 536 So.2d 221 (Fla. 1988). The prosecution did not prove its absence beyond a reasonable doubt. This factor must be stricken.

b. The trial court unlawfully found pecuniary gain as a separate aggravating circumstance.

Judge Coker specifically found "pecuniary gain", Section 921.141 (f) to be an aggravating circumstance. R 1105. He also found robbery to be an aggravator. R 1105. The sentencing order specifically relates Judge Coker's decision that "aggravating circumstances B, D, and E are based on the same aspect of the criminal episode and have been considered by the Court as a single aggravating circumstance." R 1107. In the weighing process, the trial court considered "F", pecuniary gain, as a separate aggravator. Such doubling is statutory and constitutional error. Provence v. State, 337 So.2d 783 (Fla. 1975); Zant v. Stephens, 462 U.S. 862 (1983).

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[87] See e.g., Amoros v. State, 531 So.2d 1256 (Fla. 1988); Hamblen v. State, 527 So.2d 800 (Fla. 1988); Lloyd v. State, 524 So.2d 396 (Fla. 1988); and Perry v. State, 522 So.2d 817 (Fla.1988). See also Scull v. State, 533 So.2d 1137, 1142 (Fla. 1988) (victims beaten with a baseball bat, but no "competent and substantial evidence" to show they were "contract or execution style"). In Lloyd, the defendant arrived at the victim's house armed with a .38 caliber pistol, demanding money and ordering the victim and her daughter into the bathroom. The victim was shot twice, the fatal shot being fired in contact with her head. CCP was disapproved. While there was a "suspicion that this was a contract killing," it was not proven beyond a reasonable doubt.

c. The trial court gave unlawful deference to the jury's death recommendation.

The trial court said: "[t]his jury has spoken, has made its recommendation to me. It's my understanding of the law that the only time a Court should override a recommendation of the jury is in those instances wherein the Court finds that no reasonable person could have done as they did, and I don't find that to be so in this case." R 951-2. In Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985), the Court found it Eighth Amendment error 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 rests elsewhere." There it was the jury which was misled as to its role in the sentencing process; here it was the trial judge.

Judge Coker gave unlawful weight to the jury's death recommendation, and inaccurately applied the Tedder standard of review of a life recommendation to the advisory verdict rendered here. Florida's "clear statutory directive that the jury's rule is advisory," Combs v. State, 525 So.2d 853 (Fla. 1988), was disregarded. Grossman v. State, 525 So.2d 833 (Fla. 1988), requires "great weight" be given to a jury's death recommendation, but only in the case of a life verdict does the higher "no reasonable person" standard apply. See Tedder v. State, 322 So.2d 908 (Fla. 1975).

In Ross v. State, 386 So.2d 1191 (Fla. 1980) the trial court made specific findings in aggravation and mitigation, but prefaced those findings by saying "this Court finds no compelling reason to override the recommendation of the jury. Therefore, the advisory sentence of the jury should be followed." Id. at 1197. This Court ordered resentencing finding "the trial court gave undue weight to the jury's recommendation of death ..." Id. at 1197. The same rule should apply here. Mr. Bruno's death sentence should be vacated.

d. The trial court committed Gardner error

Judge Coker announced he had reviewed among other things, "the letters from Miss Grunger." R 950. He did not elaborate. There were no letters from such a person in the record of this case, and no mention of such. Appellate counsel

twice sought to have the record supplemented with the letters,[88] and both times the motion was granted.[89] The second motion produced an order from Judge Coker with a letter from Ms. Gruninger attached. The single letter, Judge Coker says, is the only one he could find in his file and he was unable to further supplement the record. Third Supp. R., V. II, at 12.

There are three conclusions to be drawn from the court's reference to the letters at sentencing, and later responses to motions to supplement: (1) The trial court did receive off the record communication in this case which he thought relevant to sentencing, (2) no one else had chance to review them, and (3) this Court never will.

In Gardner v. Florida, 430 U.S. 349 (1977), the Court held a death sentence based upon information known to the trial court but unknown to the defense violated the Eighth Amendment requirement of reliability in capital sentencing proceedings. It ordered the death sentence vacated because Mr. Gardner "was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." 430 U.S. at 362. Also placed at peril by such conduct, the Court concluded, was this Court's ability to properly conduct its review of the death sentence without a record of what the trial court used in its imposition. We have both problems here. The death sentence must be vacated.

e. The trial court erred by relying on the Pre-Sentence Investigation Report.

Prior to sentencing, the trial court ordered, received, and reviewed a pre-sentence investigation report. R 951. Defense counsel objected to inaccuracies in the report, R 942-950, and the prosecutor disputed the probation officer's finding of the existence of the aggravating circumstance of avoiding arrest. R 950. The trial court nevertheless accepted the report as written and adopted the finding of the aggravating circumstance of avoiding arrest which even the prosecutor had disputed.

Appellant argues that the use of the pre-sentence investigation report was

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[88] See Motion To Supplement The Record On Appeal, at p.2, served March 11, 1988; Motion for Order Requiring Lower Court to Locate or Reconstruct Missing Exhibits, p.1, served May 17, 1988.

[89] See Third Supp. R., V. II, p.10.

require reversal on three grounds: first, it placed before the court matters outside the evidence. Second Supp. R. at 70.[90] Second, it contained statements regarding the impact on the victim and other matters irrelevant to a capital sentencing. Second Supp. R. 61, 67;[91] Third,it set out non-statutory aggravating circumstances. Second Supp. R. 59, 61, 64.[92]

f. The trial court erred in failing to adequately consider, find or weigh mitigation.

The trial court gave short shrift to mitigation in its sentencing order, simply finding without discussion that five of the eight listed statutory mitigating circumstances did not apply. R 1106-1107. On "B", (extreme mental or emotional disturbance), the court made only a "factual finding" rejecting Dr. Stillman's testimony; on "F," (capacity of the defendant to appreciate the criminality or conform his conduct to law), the court said it considered the use of drugs but found without elaboration that "in light of the circumstances of the offense and the Defendant's own testimony, there was no substantial impairment".[93] R 1106. The only other mitigating circumstance explicated in any form was "H", (circumstances of the offense, and character or record of the defendant). The Court said only that it "has considered the circumstances of the offense" (without saying what they were), "along with everything presented by the Defendant at the advisory hearing and at the sentencing hearing and finds nothing in the Defendant's record or character to be in mitigation." R 1107. This recitation of non-findings without factual discussion was followed by the magic words that "as to mitigating circumstances, none may be applied to this case," and the Court was "of the opinion that no mitigating circumstances exist to outweigh the aggravating."R 1107.

This stock no-mitigation mantra fails to fulfill the sentencer's obliga-

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[90] The use of the PSI containing extra-record evidence violates Article I, Sections 9, 16 and 17, Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments. Hutchins v. Wainwright, 715 F.2d 512 (11th Cir. 1983); Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir. 1982).

[91] This violates the Eighth Amendment. Booth v. Maryland, 107 S.Ct. 2529 (1987); Patterson v. State, 513 So.2d 1257, 1263 (Fla. 1987).

[92] Contrary to Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977).

[93] Apparently referring to Mr. Bruno's testimony on cross at penalty phase that he knew robbery and murder were wrong. See R 852-3. The impropriety of this standard is discussed below.

tion to ensure individualized sentencing by considering the "compassionate or mitigating factors stemming from the diverse frailties of humankind", Woodson v. North Carolina, 428 U.S. 280, 305 (1976). It is insufficient to comply with the Eighth Amendment or the directives of this Court. In Lamb v. State, 532 So.2d 1051, 1054 (Fla. 1988), the trial court concluded none of the mitigation rose "to the level of a mitigating circumstance to be weighed in the penalty decision." Id. at 1054. Vacating the death sentence, this Court decided it was "not certain whether the trial court properly considered all the mitigating evidence or whether it found that the mitigation outweighed the aggravation." Id. at 1054.

There was much record evidence of statutory and nonstatutory mitigation here, all of it uncontradicted. That evidence is discussed in detail at Sections IID and IVB(3). The trial court's mere recitation of consideration, without thoughtful discussion,should in itself require vacation of the death sentence.

g. The rejection of the mental health testimony was an abuse of discretion and violation of Due Process, and the Sixth and Eighth Amendments.

The unrebutted expert testimony was that Mr. Bruno suffered from schizophreniform disorder, and was insane at the time of the crime. The diagnosis was backed by a client history, clinical interview, and corroboration from a friend and Mr. Bruno's sister. Dr. Stillman's testimony established the statutory mental mitigating factors, and nonstatutory mitigation. But Judge Coker rejected the testimony "as a finding of fact." This Court has previously held a failure to find mitigation from unrebutted evidence of mental illness to be reversible in Mines v. State, 390 So.2d 332 (Fla. 1980), though more recently has declared that a trial judge is free to accept or reject expert testimony of this sort, in Roberts v. State, 510 So.2d 885 (Fla. 1987).

In this unusual case, though, the trial judge's rejection of the defense psychiatrist's opinion is attributable to a constitutionally impermissible reason: defense counsel's expression of his personal opinion to the judge that his own expert was fabricating or puffing his testimony. In a stunning sellout of his client's interests to protect his own, counsel told the trial judge in a bench conference that "to protect the record", and avoid any claim of ineffective assistance at a later time, he wanted the Court to know that Dr.

Stillman had never before told him his client was insane, and that he had in his possession two confidential reports state otherwise. Trial counsel's "struggle to serve two masters cannot seriously be doubted." Glasser v. United States, 315 U.S. 60, 75 (1942). In his zeal to shield himself from a future claim he was ineffective for not pleading insanity at trial, counsel critically undermined the testimony of his single expert on his client's mental state at the time of the crime. See Ake v. Oklahoma, 470 U.S. 68 (1985) (due process right to competent mental health assistance). Counsel told the court he wished to reveal his concerns outside the presence of the jury, but in so doing, destroyed his witness's credibility before the single person who would make the ultimate decision whether his client should live or die.[94] Here, counsel "actively represented conflicting interests," and for Mr. Bruno, this "actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 100 S.Ct. 1708, 1719 (1980). Counsel's statements, and the court's subsequent "factual" rejection of Dr. Stillman's testimony is proof enough of that. "The essence of the Sixth Amendment right to effective assistance of counsel is, indeed, privacy of communication with counsel." United States v. Brugman, 655 F.2d 540, 546 (4th Cir. 1981) (citing Glasser v. United States, 315 U.S. 60, 62 (1942) and United States v. Rosner, 485 F.2d 1213, 1224 (2d Cir. 1973)). Yet counsel forfeited that right to serve his own ends. The information brought to Judge Coker's attention was unsworn, outside of Mr. Bruno's presence, and its disclosure violated of Mr. Bruno's Fifth, Sixth, and Eighth Amendment rights. See Cf. Upjohn Co. v. United States, 449 U.S. 787 (1981); Gardner.

Even if this Court is unsure the sentence of death is based on the trial court's consideration of trial counsel's statements, it must be set aside. Zant v. Stephens, 462 U.S. 862 (1983); Mills v. Maryland, 108 S.Ct. 1860, 1866 (1988) ("In reviewing death sentences, this Court has demanded even greater certainty that the [sentencer's] conclusions rested on proper grounds.").

2. A MULTITUDE OF ERRORS IN THE CONDUCT OF THE PENALTY PHASE RENDER THE DEATH SENTENCE UNLAWFUL UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 and 17, OF THE FLORIDA CONSTITUTION.

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[94] See Douglas v. Wainwright, 714 F.2d 1532, 1557 (11th Cir. 1983) (where counsel, "[a]pparently failing to appreciate that the judge was the ultimate sentencer" ... "repeatedly emphasized to the judge there was no mitigation," and that his client "had not been a good boy" he was ineffective).

a. Introduction

The jury heard wide-ranging evidence and comment urging consideration of a number of unlawful bases for death. Argument was made in support of unlawful aggravators, and unlawful argument and comment were sprinkled throughout the penalty phase. The jury was told the judge was solely responsible for death-sentencing, but the judge thought the jury was the primary decisionmaker. Much went to the jury without objection, and cannot be grounds to reverse unless it is fundamental error. But even if this Court does not find the errors wrong enough to reverse without objection, it can find the improper comments so undermine the rationality of the jury's death verdict that it was entitled to little or no weight and vacate or reduce the sentence to life. There is ample support for such an approach in our death penalty jurisprudence. In affirming two life override cases, this Court has pointed to unobjected to arguments of defense counsel as bases for concluding the life verdict was unreasonable. In Porter v. State, 429 So.2d 293 (Fla. 1983), the affirmance of the life override rested in part on the trial court's finding that "the jury might well have been swayed by defense counsel's 'extremely vivid and lurid' description of an electrocution." Id. at 296. In Francis v. State, 473 So.2d 672 (Fla. 1985), similar reasoning was used in affirming the life override. This Court concluded there was "no reasonable basis discernable from the record to support the jury's life recommendation." That conclusion rested primarily on the prejudicial effect of "the highly emotional closing argument of defense counsel made on March 29, 1983, the Tuesday before Easter Sunday," Id. at 676. There was no objection to that argument, either, but this Court determined it undercut the reasonableness of the jury's life recommendation.

The same rule can apply to death recommendation cases in which the jury has been exposed to unlawful and emotional, but objectionless, matters during the penalty phase. It would be arbitrary to do anything else. With these principles in mind, we turn to the errors occurring before the jury at penalty phase.

b. The trial Court erred in failing to conduct an evidentiary hearing, declare a mistrial or continuance at penalty phase when the dispute between trial counsel and his mental health expert was brought to the Court's attention.

We have previously briefed the impact on the trial court of trial counsel's tale to the judge expressing his concern about Dr. Stillman's testimony that Mr. Bruno was insane. Counsel sought a bench conference in the midst of Mr. Bruno's testimony, and told the judge that, "to [his] surprise and dismay," Dr. Stillman testified he had told counsel "at least verbally," Mr. Bruno was "probably or at least possibly insane at the time of the offense". R 863. Counsel went on to tell the judge that "as an officer of the court and to protect the record", R 866 he felt it necessary to bring to the Court's and the prosecutor's attention that in two confidential letters, Dr. Stillman had indicated no problem with competency or sanity. When he had spoken with the doctor 48 hours before, counsel "made it abundantly clear" ... "this was not for the purposes of the M'Naughton rule but was for the purposes of mitigating circumstances and predicated upon that put him in touch with the family." R 864. Counsel said he did "not want it coming back that I, as the attorney and representative for the defendant, was remiss or failed to follow-up on a potentially viable insanity defense." R 864-5. The court acknowledged "he didn't take a stand as to competency or sanity", and "agreed" counsel was correct to bring the matter to his attention. R 865, 866. We have shown the impact on the trial court. Its sentencing order subsequently rejects, as a "factual finding," all of Dr. Stillman's testimony.[95]

All of this resulted in prejudice more far-ranging than the impact on the court. Counsel's decision to protect his own interests at the expense of his client's led him to unilaterally void Mr. Bruno's attorney-client privilege, psychotherapist-patient privilege, his Fifth and Sixth Amendment right to confidentially consult with counsel and Eighth Amendment right to rebut sentencing information secretly considered by the sentencing court. See Section IV, B1(g). The actual and apparent conflict which precipitated counsel's move also continued to constrain his representation through the rest of the penalty phase, and deprived Mr. Bruno of his due process right to competent mental health testimony. See Ake v. Oklahoma, 470 U.S. 68 (1985).

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[95] At the conclusion of penalty phase, counsel placed essentially the same dispute on the record, outside the presence of the defendant, jury, and court, but with opposing counsel present. R 917.

Counsel's dispute with the single mental health expert infected the jury's consideration of the mental health evidence at penalty phase. It let the prosecutor argue to the jury, without objection, that Dr. Stillman "doesn't know what he's talking about." R 884.[96]

During defense closing, trial counsel argued Dr. Stillman's testimony, but also contradicted it, and felt compelled, apparently, to invite the jury to disbelieve his testimony on sanity:

> ...it was never the defendant's contention that the defendant was so intoxicated or so inebriated that he was under the law insane.
>
> This is a very high standard ... We are not saying that. We didn't say this during the guilt or innocence phase.

R 886-887.

Arguing the statutory mental mitigating, counsel went on to say:

> And I think we have shown - and as the judge has instructed you previously or may, in fact, instruct you, with an expert witness you can believe any part of what he says, all of what he says, none of what he says....

R 898.

All of this could have been prevented. When the trial court was informed of counsel's concerns, its obligation was clear: hold an evidentiary hearing to sort the matter out, and grant a mistrial or a continuance. Proceeding with penalty phase under the circumstances rendered it fundamentally unfair.

c. The jury was misled as to its role in the sentencing process.

There was never a time this jury was told its penalty verdict would carry weight; throughout the proceedings, it was repeatedly told otherwise.[97] Neither was there an accurate instruction to the jury when the time came for it to hear

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[96] Taking his cue from defense counsel, the prosecutor said: the jury "all of a sudden at the time of sentence he runs in and says the defendant was insane at the time of the offense. He is wrong. He simply never came to that conclusion. You know that he never came to that conclusion. We have to give Mr. Stella more credit than this, to let that defense pass by." R 884-85 (emphasis supplied). The prosecutor told the jury "they simply had no defense. If they had had an insanity defense, Doctor Stillman would have appeared before this. Doctor Stillman simply doesn't know what he's talking about, he simply doesn't." R 885.

[97] Voir dire shows a repeated denigration of the jury's role at sentencing, prospective jurors being advised that the judge was not required to follow its "advice" on the sentence, and that it did not impose sentence, as that was the Court's function, not the jury's. R 144. Jurors were told only their recommendation could "lead" to the death penalty. R 144. If they recommended death Mr. Bruno could get life, and vice versa. R 176.

the penalty phase.[98]

In Caldwell v. Mississippi, 472 U.S. 320 (1985) the Court wrote: "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. Pait v. State, 112 So.2d 380, 383-84 (Fla. 1959) (misinforming the jury of its role constitutes reversible error); Blackwell v. State, 79 So. 731, 735-736 (Fla. 1918) (same). In Garcia v. State, 492 So.2d 360 (Fla. 1986), this Court affirmed Caldwell's application to Florida's death sentencing process, writing: The Court found "[t]here is no error; this is the law" -- "It is appropriate to stress to the jury the seriousness which it should attach to its recommendation and, when the recommendation is received, to give it weight. To do otherwise would be contrary to Caldwell v. Mississippi --- and Tedder v. State. " Id. at 856.

Though there was no objection to the comments and instruction, reversal is required, or the Court should alternatively give the death recommendation the weight the jury was told it would be given: virtually none.

d. The State unlawfully used nonstatutory aggravation for its case in chief, and in its cross-examination of defense witnesses.

(i) Nonviolent crimes

Outside the jury's presence, defense counsel stipulated that Mr. Bruno had been previously convicted of possession of cocaine and marijuana. R 783. When the jury came in, the Court asked if the state had any more witnesses, and the prosecutor began the penalty phase by reciting to the jury the stipulation of the two prior felony convictions. R 785. Though there was no objection, this was error. Our law forbids evidence or argument on nonstatutory aggravating circumstances. Provence v. State, 337 So.2d 783 (Fla. 1976). In Maggard v. State, 399 So.2d 973 (Fla. 1981), this Court reversed the death sentence where

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[98] The judge told the jury of the advisory nature of their verdict before penalty phase began, but emphasized the "final decision --- rests solely with the judge of this Court." R 789. Introducing counsel's closing at that phase, the Court further denigrated the jury's role, saying the attorneys will now "have an opportunity to speak with you with regard to their feelings about what it is I should do." R 883 (emphasis supplied). The final instructions continued the theme, as the judge told the jury they were to "advise the Court", but the Court had the "final say" and theirs was only an "advisory opinion". R 909, 911.

such evidence had been admitted, when the trial attorney waived the mitigating circumstance and objected. Accord, Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986).[99]

The prosecutor made a feature of the non-violent crimes in his cross of defense witnesses. He repeatedly asked Dr. Stillman about the "other crimes" under the guise of trying to determine Bruno's mental state at the time of those crimes. R 827. When the witness said he didn't know, the prosecutor made reference to non-record facts about "tearing the top off envelopes" "throwing cocaine out a car window," and so on. R 828. Likewise, the prosecutor continued asking Mr. Bruno about the prior crimes. R 853-4. His closing argument did nothing to cure the misleading presentation, and in fact made it worse. He began his closing by telling the jury the mitigating factors are the ones that are "supposed to be" in favor of the defendant, and immediately pointed to the cocaine and marijuana conviction as evidence of a criminal history. R 884. The state is clearly prohibited from arguing lack of mitigation in aggravation, as it did here. Mikenas v. State, 367 So.2d 606, 610 (Fla. 1979). While the prosecutor did pay "lip service to its inability to rely on these other crimes in aggravation," Robinson v. State, 487 So.2d 1040, 1042 (Fla. 1986), the order of proof, absence of a limiting instruction, and comment that mitigating factors are "supposed to be" in favor of the defendant "improperly let [] the state do by one method something which it cannot do by another" Robinson, 487 So.2d at 1042. The otherwise inadmissible convictions of nonviolent crimes could have misled the jury in this case. A new penalty phase should be ordered.

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[99] Here, the defense attorney stated his intent to argue there was no significant criminal history in mitigation, and refused to waive that factor. While the Maggard holding relies in part on defense waiver of the mitigating circumstance, the concerns expressed carry no less force when the defense seeks to argue it in mitigation, but the State presents the otherwise inadmissible prior nonviolent felony convictions for its case-in-chief. It is altogether reasonable to conclude the jury was misled by the order of presentation of the proof into thinking it should consider the prior crimes in aggravation. First, the Court introduced the penalty phase by telling the jury that the "State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant." R 784. While the trial court told the jury they would be considering aggravating and mitigating circumstances, he didn't tell them what those were at that time. R 785. The prosecutor then presented the convictions as the state's only additional evidence in support of a death sentence, which the jury heard without any instruction which would limit consideration of those crimes to mitigation rebuttal. Here, the careful delineation of Florida's capital sentencing statute that only prior violent felonies are permitted in aggravation was circumvented, and the jury badly misled.

(ii) Inflammatory and irrelevant questions related to Mr. Bruno's tattoos.

One of the bases for the expert's opinion on Mr. Bruno's mental health was the appearance of numerous tattoos on his body. Jumping off that wholly reasonable penalty phase evidence, the prosecutor portrayed Bruno's tattoos in his questioning of the psychiatrist, as evidence instead that Bruno was "evil". R 820. He was more explicit when he crossed the defendant. For his first question, the prosecutor asked about Mr. Bruno's "swastika tattoo," and whether it wasn't a "Nazi good luck sign." R 848.

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). "Needless and inflammatory comments by the prosecutor" are "prosecutorial over kill," and cause for reversal. Teffeteller v. State, 439 So.2d 840, 845 (Fla. 1983). These comments had nothing to do with Florida's death sentencing guidelines or the Eighth Amendment, and deserve reversal.

e. The Jury was told it could consider aggravating circumstances not supported by the evidence, find aggravators based on improper considerations, and that it could weigh aggravators unlawfully.

Five aggravating circumstances were argued to the jury in support of death: prior violent felony, felony-murder, pecuniary gain, heinous, atrocious or cruel, and cold, calculated or premeditated. R 883-894. The Court was instructed the jury it could find each as a basis for a death verdict. R 908-09.

On prior violent felony, the prosecutor said the conviction on the robbery count was sufficient to find this aggravator. R 887. This is flat false, as the robbery involved the same person who was killed. Wasko v. State, 505 So.2d 1314 (Fla. 1987).

The jury was told to find felony-murder based on the robbery count on which Mr. Bruno had just been convicted. R 887-888. We have previously briefed the insufficiency of evidence of the robbery. Section IVA2. The failure of the state to prove this factor beyond a reasonable doubt[100] means the jury should not have been permitted to consider it as supporting a death sentence.

On pecuniary gain, the prosecutor alternatively argued the jury should and

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[100] Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988).

should not find this aggravator. R 888.[101] As previously briefed, this factor was not shown beyond a reasonable doubt. Section B(1)(e)(iv). Rogers v. State, 511 So.2d 526 (Fla. 1987); Simmons v. State, 419 So.2d 316, 318 (Fla. 1982).

Addressing the first three circumstances together, the prosecutor invited the jury to count all three as one, or as three separate aggravating circumstances. R 889.[102] This was an invitation to jury lawlessness, as separate consideration of those factors (trebling) is clearly unlawful, and unconstitutional. Provence v. State, 337 So.2d 783 (Fla. 1976); Zant v. Stephens, supra.

On HAC, the prosecutor argued the crime was "wicked" and "evil" because Mr. Bruno committed it in front of his "15 year old son," ... "that he made his 15-year old son watch him do that," and "even gets his son to help participate." R 890-91. Our law precludes consideration of the effect on any others besides the victim as support for this factor.[103] Riley v. State, 366 So.2d 19, 21 (Fla. 1979) (error to consider nature of other offenses as heinous, atrocious or cruel). Invocation of this familial relationship was improper and inflammatory, and misled the jury on this factor which is difficult enough to apply.

Concluding his argument, the prosecutor departed from the death penalty statute and provided his own notions of why Mr. Bruno should be executed. He first invoked (falsely) the testimony of Mr. Bruno's father: "These facts are a case for death. Even the defendant's own father knew it. He said when he was asked what he should get out of this, he said I don't think he deserves what he is going to get." R 892. Then, recalling the testimony of another witness from guilt phase the prosecutor argued Mr. Bruno "told Sharon what he was going to get. Her testimony was that ... he was going to fry for it. He knew it." R 892-93. This circumstance is not listed in the statute, and is improper. Provence v. State, 337 So.2d 783 (Fla. 1976). Telling the jury that others

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[101] Compare, "He did it for the stereo, at least that is one of the reasons he did it" ... "It says Lionel Merlano's life is worth a few pieces of stereo. That's all that it was worth to him, and that's why this is an aggravating circumstance" with "But I don't care if you find this an aggravating circumstance or not because he didn't do it to get the stereo equipment." R 888.

[102] The prosecutor highlighted their value saying "Florida law says this is a such an important aggravating circumstance that it's in three places that can fit. So this is a very important aggravating circumstance." R 888.

[103] The improper argument was not cured by the HAC instruction, which we challenge as vague, infra.

"know" Mr. Bruno should die unconstitutionally dilutes their sense of responsibility for their recommendation. The prosecutor denigrated the entire process of individualized sentencing, and continued to argue nonstatutory aggravation that a death sentence was "just inherent in the nature of the fact of the murder that Mr. Bruno committed. It is a death case. It is what he deserves." This argument unconstitutionally persuaded the jury to impose death without regard to mitigation, or the carefully constructed weighing process set forth in section 921.141 See Woodson v. North Carolina, 428 U.S. 280 (1976) (no mandatory death sentences).

While there was no objection to any of this, it should undermine this Court's confidence in the lawfulness of the jury's recommendation and thus the weight accorded it, or be treated as fundamental error. Pait v. State, 112 So.2d 380 (Fla. 1959); Ryan v. State, 457 So.2d 1087, 1091 (Fla. 4th DCA 1984). Resentencing before an untainted jury is normally required where such argument is heard. 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 circumstances the jury recommendation is tainted [and] appellant is entitled to a new sentencing trial").

f. The Prosecutor unlawfully derided mental health evidence and argued an improper standard for considering it.

This Court has recognized "a legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of a mental illness, uncontrolled emotional state of mind, or drug abuse." Miller v. State, 373 So.2d 882, 886 (Fla. 1979).[104] The prosecutor here, an officer of the Court and representative of the state, was permitted to express his personal opinion to the jury that "the practice of psychiatry is often no more than a little guess. It's like a blind man in a dark room looking for a brown hat which isn't there." R 884. In Garron, the Court found it reversible error for the

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[104] The Eighth Amendment forbids the use of mental illness as an aggravating factor. Zant v. Stephens, 462 U.S. 862, 885 (1983). Due process requires the appointment of a competent psychologist or psychiatrist to assist the defense when mental health is at issue to enhance the reliability of factfinding. Ake v. Oklahoma, 470 U.S. 68 (1985). Florida precludes lay testimony on sanity from after the fact observations: "This is clearly the domain of experts in the field of psychiatry." Garron v. State, 528 So.2d 353, 357 (Fla. 1988).

prosecutor to put "the issue of the validity of the insanity defense before the trier of fact," Id. at 357, and in Rosso v. State, 505 So.2d 611 (3d DCA 1987), the court found it fundamental error to denigrate the defense of insanity. So too it is reversible here for the prosecutor to place psychiatry on trial.

g. The prosecutor argued an improper standard for establishing mitigating circumstances, argued mitigation in aggravation, and nonstatutory aggravation.

Any sentencing jury following the prosecutor's exhortations here would not be following the law. Introducing mitigating circumstances as the ones that are "supposed to be" in favor of the defendant, R 884, the prosecutor gradually arrived at the "extreme duress or domination of another" mitigating circumstance. Erecting a straw horse then blowing it down, the prosecutor falsely told the jury the defense was contending Mr. Bruno was under the domination of another, then twisted that mitigating into aggravating:

> Frankly, I don't know why they want to argue this. It is simply not supported by the facts in the trial in chief or the facts presented today. I don't know why he wants to argue this to you. He was under no duress or domination from anyone. He took his 15 year old son with him. His 15 year old son didn't make him do it. I don't know why they want to argue that. No one made him kill Lionel Merlano.

R 885. (emphasis supplied). The state may not argue mitigation as aggravation, as it did here. Mikenas v. State, 367 So.2d 606, 610 (Fla. 1979).

As he got to the end of the "list", the prosecutor misled the jury on the "character or record" mitigating circumstance, denigrated its value, and continued his theme that mitigation could be used as a springboard to find aggravation. For years the central premise of Eighth Amendment jurisprudence has been that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence'". Hitchcock v. Dugger, 107 S.Ct. 1821, 1822 (1987). Addressing the single mitigating circumstance by which the jury is required to consider "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind" Woodson v. North Carolina, 428 U.S. 280, 304 (1976) the prosecutor said:

> Next, the next possible one, and this is something in all cases, it says only other aspect of the defendant's character or record, and only other circumstance of the offense.
>
> Well, I think Mr. Bruno showed us his true character on the stand today. He's blaming his son; he is simply blaming his son.

R 886-87 (emphasis supplied).

Contortion of mitigation into aggravation in this manner is contrary to Florida law and the Eighth Amendment. But the sentencing jury was permitted to hear the argument, without correction.

In his explanation of the mental health mitigation, the prosecutor fared no more lawfully. He told the jury Mr. Bruno knew right from wrong, R 886, which is unquestionably an improper legal standard. Mines, supra.

3. THERE IS SUBSTANTIAL RECORD EVIDENCE IN MITIGATION CALLING FOR A SENTENCE LESS THAN DEATH.

a. The Proper Standard of Review.

The trial court found no mitigation, though much was presented by the defense. Where there is a death recommendation, case law sometimes restricts this Court's review of the mitigating evidence actually presented, and the weight it should be accorded. "It is up to the trial court to decide if any particular mitigating circumstance has been established and the weight to be given it." Hudson v. State, 538 So.2d 829 (Fla. 1989), (citing Toole v. State, 479 So.2d 731 (Fla. 1985) and Daugherty v. State, 419 So.2d 1067 (Fla. 1982), cert. denied 459 U.S. 1228 (1983)). Accord, Stano v. State, 460 So.2d 890 (Fla. 1986).

There is a constitutional deficiency in this Court's sometimes unduly deferential review of mitigation in death recommendation cases. Today, "there is no disputing" the constitutional mandate that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1989). In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court vacated a death sentence when the trial court and reviewing court considered themselves limited in their consideration and weighing of mitigation. A reviewing court's refusal to consider or weigh mitigation violates the Eighth Amendment. Id. at 113-14.

"[T]hese admonitions" were recognized by this Court in Rogers v. State, 511 So.2d 526 (Fla. 1987), but have not been consistently followed in subsequent cases. They should be here, and there is every reason to do so. The mitigation "is established by uncontroverted factual evidence in the record,"[105] Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988), and the trial court's perfunctory

[105] With the exception of some of the mental mitigation, issues addressed in Section B1(g), B2(b) and B3C(ii) of this brief.

discussion of it leaves this Court free to consider, find and weigh it. See Lamb v. State, 532 So.2d 1051, 1054 (Fla. 1988).

b. The Evidence in Mitigation

(i) Mr. Bruno's background, character and mental health.

> I don't know exactly what it is going through this guy's mind. But a man who would take a crowbar and a gun and do what he did is not completely rational.
>
> From State's closing argument at guilt phase, R 703-04.

Whatever was going through Michael Bruno's mind passed through a haze of alcohol and drugs which from years of abuse had already left their damning damage. But it was not always so. In his early years, he was a "good boy," active in sports, in taking music lessons, and participating in youth organizations. R 787-9, 795-7. He never caused his parents any trouble, he was peace-loving, and as his mother described him, "happy-go-lucky." R 791. He made it through childhood against the odds. He suffered from the knowledge of his father's incapacitating disease which left him helpless for much of his youth. R787, 795.

With his father hobbled, Michael's mother raised her three children as best she could. R 787. But as Michael traveled through adolescence, the absence of his father had a telling effect, and he left home to try out his wings fresh out of high school. R 788-9. The change in his personality was abrupt. He "started running wild," and "getting tattooed a lot." R 789. He got married, and had two children. There were problems, and his wife left him. R 789. Michael's mom testified that at that point he went "berserk": "he just didn't care, have any desire to live, to go on living, because his love for his children was very great, very strong, and he didn't want to lose his children." R 789. He tried to commit suicide, and was admitted to a psychiatric hospital. But he was released before he could be treated. R 790, 796.

It was during this time Michael Bruno succumbed to cocaine, taking heavy doses daily. R 838. On January 28, 1986, he was arrested for buying cocaine rocks. First Supp. R. 62, R 785. The self-destructive juggernaut did not stop there. His father noticed he was "getting skinny," was tired a lot, and was

surprised by his "weird" Mohawk haircut. R 798.[106] His mom heard rumors from Michael's friends that he was doing drugs, and before this crime he set them both down and confided his drug problem. R 790. But it didn't stop.

In the weeks preceding the killing, Michael Bruno was abusing an ounce of cocaine daily, mostly smoking it. On the night of the killing, he was freebasing cocaine, R 880, and had been drinking since the early evening at the party at Candlewood, see R 377, at the Spaldings, R 353, and at Merlano's apartment. R 426, 428. He was far from "rational."

(ii) The unrebutted mental health evidence compels findings of the statutory mitigating circumstances of "extreme emotional or mental disturbance" and "substantial impairment."

A. The capital felony was committed while Mr. Bruno was under the influence of extreme mental or emotional disturbance.[107]

Dr. Stillman's testimony and the improper reasons it was rejected by the trial court is discusssed above. See Sections II D, IV B1 (g) and IV B2 (b). The unrebutted testimony compels a finding of statutory mitigation. Hardwick, 521 So.2d at 1076.

B. The Capacity of Mr. Bruno to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.[108]

The unrebutted evidence of Mr. Bruno's impairment at the time of the crime is bountiful. His addiction to drugs, continuous and unrelenting use of alcohol and drugs, and use of them the night of the killing was attested to by every witness, lay and expert, who testified at penalty phase (and many at the guilt phase). Yet Judge Coker rejected this statutory mitigating factor:

> (f) This mitigating circumstance does not apply in this case. The Court has considered the Defendant's use of the drugs prior to and at the time of the murder, but finds in light of the circumstances of the offense and the Defendant's own testimony at the advisory hearing as to his state of mind, that he had no substantial impairment.

R 1106. (emphasis supplied).

Apparently finding credible the evidence of drug use, the judge neverthe-

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[106] Even so, he continued to work, appearing in three episodes of "Miami Vice." First Supp. Record at 65, and working at Atlantic Auto Motor. R 838. His supervisor said he "wished he had twenty like him. He was an artist and a very talented man." First Supp. Record at 65.

[107] Section 921.141(6)(b), Fla. Stat. (1986).

[108] Section 921.141(6)(f), Fla. Stat. (1986).

less ignored the psychiatrist's testimony as to its debilitating effect on Mr. Bruno,[109] and based his rejection squarely on Mr. Bruno's testimony.[110] Mr. Bruno's only testimony concerning his "mental state" at penalty phase was under cross-examination, when the prosecutor asked if at the time of the crime he "knew" that robbery and murder were "wrong". R 852-3.[111] The trial judge used an unlawful standard in rejecting this mitigation. There are few legal principles better settled in Florida capital law than the one disregarded here: knowing the difference between right and wrong does not preclude a finding of this circumstance in mitigation. State v. Dixon, 283 So.2d 1 (Fla. 1973). The trial court's rejection of this factor is reversible.

"[E]vidence [of drug or alcohol abuse] must be considered in mitigation, Fead v. State, 512 So.2d 176, 178 (Fla. 1987); Cannady v. State, 427 So.2d 723, 731 (Fla. 1983); Buckrem v. State, 355 So.2d 111, 113-14 (Fla. 1978), especially where established by evidence uncontroverted in the record." Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988). The guilt phase testimony showed Mr. Bruno drinking the night of the killing, first at a party at the Candlewood Apartments, then at the Spalding-Maheu party, and at the apartment itself. Others attested to his long-term drug problem. Mr. Bruno admitted using cocaine heavily in the weeks preceding the killing, and smoking it the evening of the killing. The trial judge evidently believed the testimony, from the language of the sentencing order. Evidence of impairment of this sort lessens Mr. Bruno's culpability, and should be found by this Court in mitigation.

(iii) The evidence requires a finding that the background and history of Mr. Bruno include significant non-statutory mitigating factors.

Young Michael Bruno's good behavior as a boy, his peace-loving nature, good treatment of his parents, and participation in youth activities are among the "compassionate or mitigating frailties of humankind," Woodson v. North Carolina, 428 U.S. 280, 305 (1976), the Supreme Court has held call for a

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[109] For the unlawful reasons discussed above.

[110] The court does not explain what it meant by the cryptic reference to the "circumstances of the offense", or how they in any way indicated absence of a substantial impairment.

[111] This is consistent with the prosecutor's persistent, illegal reference to the right-wrong standard before the jury at penalty phase. R 885-6.

sentence less than death. His good behavior stands in the face of his difficult one-parent childhood, which this Court has looked to in mitigation. See Spivey v. State, 529 So.2d 1088, 1095 (Fla. 1988), and Remeta v. State, 522 So.2d 825 (Fla. 1988). His painful passage through a divorce, suicide attempt and anguish over the separation from his children are also circumstances tending to mitigate. Perry v. State, 522 So.2d 817, 821 (Fla. 1988).

While the court found inapplicable the statutory mitigating circumstance of no significant prior criminal history,[112] it is a non-statutory mitigating circumstance that there was no violent criminal history in Mr. Bruno's background. Proffitt v. State, 510 So.2d 896, 898 (Fla. 1987) ("the trial judge expressly found that Mr. Proffitt's lack of any significant history of prior criminal activity or violent behavior were mitigating circumstances").

Mr. Bruno's excellent work record ("I wish I had twenty like him") is also relevant to his character, and should be found by this Court in mitigation. Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988); Cooper (Vernon) v. Dugger, 526 So.2d 900, 901 (Fla. 1988) ("Petitioner proffered testimony concerning his prior employment and his efforts to rehabilitate himself since he was released from jail clearly was relevant mitigating evidence").

Even if this Court decides the evidence of emotional disturbance and substantial impairment does not meet the statutory standard of a mitigating circumstance, it is strong nonstatutory mitigation. Cf. Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987) (while trial judge found evidence "did not rise to the level of statutory mitigating circumstances," properly considered as nonstatutory mitigation). Intoxication, standing alone, has been repeatedly considered to be mitigation without reference to statutory circumstances. See e.g., Fead v. State, 512 So.2d 176, 177-8 (Fla. 1987); Buckrem v. State, 355 So.2d 111, 113 (Fla.1978); Norris v. State, 429 So.2d 688, 690 (Fla. 1983). Mental state mitigation goes to the core issue of capital sentencing. Since it affects intent, it reaches the bottom line of the life or death decision -- moral culpability. "[T]he individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant." California v. Brown, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring).

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[112] Section 921.141(5)(e), Fla. Stat. (1986).

Evidence of "reduced capacity for considered choice ... bear[s] directly on the fundamental justice of imposing capital punishment." Skipper v.South Carolina, 106 S.Ct. 1668, 1676 (1986) (Powell, J., concurring).

The evidence of Mr. Bruno's impaired decisionmaking ability is strong and substantial, and significantly lessens his moral culpability for the killing.

(iv) The Circumstances of the Offense and Treatment of Other Participants.

> "You want me to charge Jody Spalding with a crime? You want me to charge Sharon Spalding with a crime? They knew they had some stolen property there, and they kind of helped the defendant after it happened...."
>
> From the State's closing argument at guilt phase. R 708.

The drunken, drugged dispute, escalating to a fight and ultimately a killing, mitigate the offense. See Wilson v. State, 493 So.2d 1019 (Fla. 1986). But more relevant is the extraordinarily lenient treatment of other participants, who had varying degrees of culpability. Michael Bruno, Jr., according to his testimony, handed his father the gun which was used to commit the killing, but got off scot-free. R 101, 439, 737. Jody Spalding helped dispose of the weapons with knowledge of their use, R 395-96, went back to the apartment with Mr. Bruno after the killing, R 398-99, 400-02, threw away his sneakers which he knew were evidence, R 403, and lied to the police. R 407. He was told he could be charged as an accessory, R 407-08, but was not charged with anything. Christopher Tegue admitted the gun used in the killing was his. R 346, 363-4. Sharon Spalding, Arthur Maheu, and Jody Spalding all made use of the stereo equipment even when they were told where it came from, R 412, 453, and Sharon Spalding lied to the police and tried to dispose of the stereo and computer. R 453. None of them were charged with anything.

Disparity of treatment of persons who are involved in the offense is a powerful mitigating factor. It strikes to the heart of consistency and fairness in the application of the death penalty, and has been cited by this Court on numerous occasions as a compelling factor calling for a sentence less than death. See Downs v. Dugger, 514 So.2d 1069 (Fla. 1987) and Craig v. State, 510 So.2d 857, 870 (Fla. 1987). While disparate treatment is more persuasive where

other participants are equally culpable in the actual killing,[113] this Court has recognized mitigation can flow from the disparate treatment of others whose role in the killing is attenuated.[114] The disparate treatment here is profound: Mr. Bruno is under sentence of death; Michael Bruno, Jr., the Spaldings and others are free and will never be charged in connection with this episode. This extraordinarily unequal treatment, even accounting for the varying degrees of culpability, stands as a solid statement that death is not appropriate here.

4. DEATH IS DISPROPORTIONATE

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 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). To remain faithful to the promise of Dixon, "substantive proportionality must be maintained in order to ensure that the death penalty is administered evenhandedly." Fitzpatrick, 527 So.2d at 811. Now is the time to correct the uneven application of the death penalty to Mr. Bruno.

Mr. Bruno's case contains most of the features which have led this Court to reduce the sentences of others to life. Cf. Smalley v. State, 14 FLW 342, 343 (Fla. Jul. 6, 1989), Lloyd v. State, 524 So.2d 396 (Fla. 1988). There are numerous invalid aggravating circumstances, and substantial mitigation in the record. This combination has persuaded this Court to reduce sentences to life in Livingston v. State, 13 F.L.W. 187 (Fla. 1988) (after striking an aggravating circumstance, court determined mitigation it found "counterbalanced" the remaining aggravators and the case thus did not warrant the death penalty), Rembert v. State, 445 So.2d 337, 340 (Fla. 1984) (where court struck aggravating factors and there was "a considerable amount of nonstatutory mitigation" not found by the trial judge, sentence reduced to life), Blair v. State, 406 So.2d

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[113] Spivey v. State, 529 So.2d 1088 (Fla. 1988); Cailler v. State, 523 So.2d 158 (Fla. 1988); Malloy v. State, 382 So.2d 1190 (Fla. 1979).

[114] Burch v. State, 522 So.2d 810, 813 (Fla. 1988) (fact that persons whose argument with victim precipitated the homicide were not charged is reasonable mitigating factor). Neary v. State, 384 So.2d 881, 885-886, 888 (Fla. 1980) (dismissal of co-defendant, case on judgment of acquittal motion, where co-defendant "played significant role in perpetration of this criminal act," was mitigation).

1103, 1109 (Fla. 1981) ("because of the existence of a mitigating factor, and the improper inclusion of several aggravating factors, we must reduce to life"), and Kampff v. State, 371 So.2d 1007 (Fla. 1979). See also Amoros v. State, 531 So.2d 1256 (Fla. 1988) and Banda v. State, 536 So.2d 221 (Fla. 1988), where this Court found death disproportionate after striking all the aggravating factors.

Mr. Bruno's mental illness and impaired mental state at the time of the crime is akin to that of Ernest Fitzpatrick whose sentence was reduced to life. The evidence of dispute also renders death disproportionate. See Ross v. State, 474 So.2d 1170 (Fla. 1985), and Banda. Mr. Bruno is similarly situated to Mr. Proffitt, whose sentence was reduced in Proffitt v. State, 510 So.2d 896, 898 (Fla. 1987). There the killing was committed by stabbing in the course of a burglary. This Court noted much of the same mitigation Mr. Bruno has offered, including intoxication and lack of a violent criminal history. Id. Accord, Smalley. The impaired mental state of the deceased here also distinguishes this case.

The totality of the record does not cry out for death. Mr. Bruno's was not "the most aggravated, most indefensible of crimes," and life imprisonment is punishment enough.

5. FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL, FACIALLY AND AS APPLIED.

A. Florida's heinous, atrocious, or cruel and cold, calculated, and premeditated aggravating circumstances are so vague in their application that they cannot provide the guidance to the sentencer the rational basis for review or the limits to the class of the death eligible required to insure defendants are not condemned to die by a sentencer's caprice.

(i). The Eighth Amendment prohibits unlimited and unguided death penalty proceedings.

Cruel and unusual punishment, prohibited by the Eighth Amendment to the United States Constitution and Article I, Section 17 of the Florida Constitution, results when a sentencer condemns a defendant to death without principled standards to determine the appropriateness of the penalty.[115] The Court struck Georgia's aggravator that the offense "was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an

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[115] The Eighth Amendment requires principled standards (1) to limit objectively the class of death eligible, (2) to guide and channel the sentencer's discretion, and (3) to make the sentence rationally reviewable on appeal.

aggravated battery to the victim" because it failed to narrow the class of death eligible in Godfrey v. Georgia, 446 U.S. 420, 422 (1980). In Maynard v. Cartwright, 108 S.Ct. 1853 (1988) the Court held that a similar Oklahoma aggravator violated the Constitution because the vagueness of the aggravator failed to channel the jury's discretion. The Court noted the importance of meaningful appellate review in approving the constitutionality of Florida's death penalty statute in Proffitt v. Florida, 428 U.S. 242, 253 (1976). The inability to review an aggravator in a meaningful way again calls its constitutionality into question. See Godfrey, 446 U.S. at 432-433.

(ii) Florida's vague application of its heinousness aggravator fails to guide the sentencer, limit the class of the death eligible, or provide a rational basis for review of death sentences.

Florida's statute on its face provides no limits or guides to imposing a death sentence. The words of Florida's statute are identical to the Oklahoma aggravator struck in Cartwright.[116] "Especially heinous, atrocious or cruel" standing alone provides no real guidance to a sentencer:

> First, the language of the Oklahoma aggravating circumstance at issue --" especially heinous, atrocious or cruel" --gave no more guidance than the "outrageously or wantonly vile, horrible or inhumane" language that the jury returned in its verdict in Godfrey. The State's contention that the addition of the word "especially" somehow guides the jury's discretion, even if the term "heinous" does not, is untenable. To say that something is "especially heinous" merely suggests that the individual jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustifiable, intentional taking of human life is "especially heinous."

The application of the heinous, atrocious or cruel aggravator in Florida reveals no principles to limit or guide the sentencers and a resulting use of the aggravator as a vague catch-all.

The sheer number of cases using the aggravator demonstrates its catch-all quality. See Adamson v. Ricketts, 865 F.2d 1011, 1031 (9th Cir. 1988), petition for cert. filed 574 U.S.L.W. 3655 (U.S. March 20, 1989) (No. 88-1553).[117]

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[116] While this Court rejected a similar claim in Smalley v. State, 14 FLW 342 (Fla. July 6, 1989), in so doing it failed to consider the importance of the jury's recommendation in the sentencing process, See Riley v. Wainwright, 517 So.2d 656 (Fla. 1988), and the case law set forth infra.

[117] From 1984 to 1988, the Florida Supreme Court has decided 209 death cases on direct appeal from conviction and sentence or resentencing. Of these decisions, the opinions positively reveal that in 113 of the cases, the trial court found the heinous, atrocious or cruel aggravator. The total heinousness cases in all likelihood is significantly higher: many opinions neither detail

The wide use of heinousness in death sentencing proceedings comes about because this Court has not been able to provide clear definitions of the terms or any principles which consistently limit the use for the aggravator. Providing an objective, reviewable, rational basis to distinguish "especially" heinous murders from non-heinous or simply heinous murders has proven impossible.

Cases in which this Court applies the heinous, atrocious or cruel aggravator are so fraught with inconsistencies and irrational distinctions as to provide no clear principles of law governing this aggravator. The cases are so many and the results so confusing that orderly analysis becomes difficult.[118]

One often repeated statement in heinousness cases is that a single gunshot or volley of shots which causes quick death and which is not preceded by a lengthy period of knowledge of the impending death by the victim cannot support a heinous, atrocious or cruel finding. Indeed, this Court recited this reason as the basis for its decisions in 17 of the 20 cases in which it held the heinous aggravator was improperly found by the trial court between 1984 and 1988. This statement does not save the aggravator in part because it is not consistently followed.[119]

The law is also confused over whether suffering after a gunshot wound can support a finding of heinousness. Some cases state slow death after shootings

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what aggravators were found nor reach sentencing issues at all. Even so, at least 54% of recent Florida death cases involve a heinousness finding by the trial court. Moreover, the Florida Standard Jury Instructions containing the definition of the aggravator were no doubt read to many of the juries in which the trial judge did not find heinousness. Thus, nearly all of Florida's death cases have been decided based on a consideration of the heinousness factor. This wide use of the aggravator is comparable to that used in Arizona which tends to show an overexpansive role. See Adamson, 865 F.2d at 1031.

[118] Much of this analysis is borrowed from Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller, 13 Stetson L.Rev. 523-554 (1984).

[119] The most glaring example of inconsistency is seen in the case of James David Raulerson. In Raulerson v. State, 358 So.2d 826, 834 (Fla. 1978), cert. denied 439 U.S. 959 (1978), the Court held that the awareness of the officer/-victim that an armed robbery was in progress justified a finding that the murder was heinous even though death came quickly from a volley of shots. Raulerson's death sentence was vacated by a federal court and he was resentenced to death. The Florida Supreme Court, without reference to its earlier decision, overturned the trial court finding that the murder was especially heinous, atrocious or cruel. Raulerson v. State, 420 So.2d 567, 571-2, (Fla 1982), cert. denied 463 U.S. 1229 (1983). In Spinkellink v. State, 313 So.2d 666 (Fla. 1975), cert. denied 428 U.S. 911 (1976), the victim was shot to death while sleeping, but the Court upheld the heinousness aggravator. Id. at 671.

cannot be used to find heinousness.[120] Others depend on just such suffering to uphold heinousness findings.[121] This Court has not consistently applied its awareness of death element of the quick death by gunshot limitation. While claiming it does not require complete unawareness by the victim of his impending death,[122] it upheld the aggravator where the victim became aware of death only a few moments before it occurred in Huff v. State, 495 So.2d 145 (Fla. 1986). Where the victim flees the murder, is chased down and shot, heinousness might apply,[123] but it might not.[124]

Even if some explanation for these inconsistencies exists, the single limitation on the use of the heinous, atrocious or cruel aggravator -- that it does not apply to quick deaths by gunshots -- does not save the aggravator. The limitation most often does not apply where the cause of death was anything but a gunshot. Stabbings are usually found heinous, atrocious or cruel.[125] A single stab would might [126] or might not [127] be found heinous. In all but three cases, this Court has upheld a finding of heinousness in which a conscious victim was

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[120] Teffeteller v. State, 439 So.2d 840 (Fla. 1983), cert. denied 465 U.S. 1074 (1984); Mills v. State, 476 So.2d 172, 178 (Fla. 1985), cert. denied 475 U.S. 1031 (1986) ("Whether the victim lingers and suffers is pure fortuity").

[121] Squires v. State, 450 So.2d 208, 212 (Fla. 1984), cert. denied 469 U.S. 892 (1984) (Murder so as to cause unnecessary pain where victim wounded by shooting and then fatally shot); Troedel v. State, 462 So.2d 392, 398 (Fla. 1984); Phillips v. State, 476 So.2d 194, 196-7 (Fla. 1985).

[122] Clark v. State, 443 So.2d 973, 977 (Fla. 1983), cert. denied 467 U.S. 1210 (1984); Jackson v. State, 451 So.2d 458, 463 (Fla. 1984), cert. denied 109 S.Ct. 183 (1988); Gorham v. State, 454 So.2d 556, 559 (Fla. 1984), cert. denied 469 U.S. 1181 (1985); Parker v. State, 458 So.2d 750, 754 (Fla. 1984), cert. denied 470 U.S. 1088 (1985) (victim killed after seeing body of boyfriend and covering face with hands).

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

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

[125] See Floyd v. State, 497 So.2d 1211, 1214 (Fla. 1986); Lusk v. State, 446 So.2d 1038, 1943 (Fla.), cert. denied 469 U.S. 873 (1984) (victim stabbed three times in the back); Morgan v. State, 415 So.2d 6 (Fla.), cert. denied 459 U.S. 1055 (1982); but see Demps v. State, 395 So.2d 501, 505-6 (Fla.), cert. denied 454 U.S. 933 (1981).

[126] See Proffitt v. State, 315 So.2d 461 (Fla. 1975), aff'd 428 U.S. 242 (1976), facts at Proffitt v. Wainwright, 685 F.2d 1227, 1264 (11th Cir. 1982).

[127] See Wilson v. State, 436 So.2d 908, 912 (Fla. 1983).

beaten to death.[128] Strangulations uniformly are found heinous. See Doyle v. State, 460 So.2d 353, 357 (Fla. 1985).

These rules turn the guidance function of the aggravator on its head. Virtually any killing where the cause of death is not a gunshot could be found heinous, atrocious or cruel. Beyond the narrow confines of the quick death by shooting limit, the aggravator provides no principles governing what crimes are more deserving of death than others.

One way to judge heinousness might be to focus on the mental state of the defendant to determine his culpability. Cases sometimes focus on the defendant's mindset, sometimes consider it one factor to be considered, and sometimes deride it as irrelevant to a heinousness determination.[129]

Another analytical theme is the mindset of the victim. The Court cites this proposition frequently where evidence reveals an awareness of impending death by the victim and consequent mental anguish.[130] The Court has also stated that events which take place after a victim has lost consciousness or died cannot be considered.[131] The Court has not consistently applied this aspect of the aggravator.[132] Even Herzog's unconsciousness limitation has not been consistently followed. In Jennings v. State, 453 So.2d 1109 (Fla. 1984), vacated 470 U.S. 1002, reversed on other grounds 473 So.2d 204 (1985), the Court held

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[128] See Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975); Rembert v. State, 445 So.2d 337 (Fla. 1984); Scull v. State, 533 So.2d 1137 (Fla. 1988).

[129] Compare Mills v. State, 476 So.2d 172, 178 (Fla. 1985), cert. denied 475 U.S. 1031 (1986) (whether victim lingers and suffers is "pure fortuity"; focus is on "intent and method" of defendant), and Card v. State, 453 So.2d 17 (Fla.), cert. denied 469 U.S. 989 (1984) (heinousness partly because defendant enjoyed killing), with Pope v. State, 441 So.2d 1073, 1078 (Fla. 1984).

[130] See e.g. Harvey v. State, 529 So.2d 1083, 1087 (Fla. 1988) (killing discussed in front of victims, one of who tried to escape); Tompkins v. State, 502 So.2d 415, 421 (Fla.), cert. denied 107 S.Ct. 3277 (1987) (awareness of death which occurs during strangulation suffices); Cooper v. State, 492 So.2d 1059 (Fla. 1986), cert. denied 479 U.S. 1101 (1987) (victim bound before death); Parker v. State, 476 So.2d 134 (Fla. 1985) (mental anguish from fear of death not negated by quick killing).

[131] See Herzog v. State, 439 So.2d 1372, 1380 (Fla. 1983); Scott v. State, 494 So.2d 1134, 1137 (Fla. 1986).

[132] Compare Brown, 526 So.2d 903 (victim police officer in agony begged his assailant not to kill him; HELD, murder not heinous), with Grossman v. State, 525 So.2d 833 (Fla. 1988) (victim police officer shot and killed in struggle for gun; HELD, murder heinous because the officer was beaten during the struggle and must have known she was fighting for her life).

that the mental anguish of the victim was not controlling.

Other potential guides to using the heinous aggravator appear in the reported opinions, but they are equally inconsistent. Some cases suggest the helplessness of the victim adds to the heinousness of the crime.[133] Others state that evidence the victim fought back prove heinousness.[134] The Court sometimes ignores evidence of incapacity. Even where the victim was incapacitated, the victim's husband was shot first, and the victim moaned after being shot, the Court overturned a finding of heinousness in James v. State, 453 So.2d 786, 789, 792 (Fla.), cert. denied 469 U.S. 1098 (1984). Many cases suggest if the victim is elderly, the crime is more heinous.[135] But see Clark v. State, 443 So.2d 973, 977 (Fla. 1984), cert. denied 467 U.S. 1210 (1984) (murder of a defenseless and elderly woman, without more, not heinous, atrocious or cruel). Some cases suggest that where the victim and defendant were strangers, the crime is more heinous.[136] But, the Court has also approved a heinousness finding because the defendant and victim were blood relatives.[137]

(iii) The lack of clear and consistent principles in the application of Florida's heinous, atrocious or cruel aggravator renders its use arbitrary and capricious in violation of the Eighth Amendment.

Florida's application of its especially heinous, atrocious or cruel aggravator suffers from the defects which infected the aggravators in Oklahoma, Georgia, and Arizona condemned in Maynard v. Cartwright, 108 S.Ct. 1853 (1988);

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[133] See Kokal v. State, 492 So.2d 1317, 1318 (Fla. 1986) (hitchhiker robbed, begged for life then killed); Brown v. State, 473 So.2d 1260, 1268 (Fla.), cert. denied 474 U.S. 1038 (1985) (heinous based in part on semi-invalid status of victim); Jones v. State, 411 So.2d 165, 169 (Fla. 1982), cert. denied 459 U.S. 891 (1985) (victim pled for life, then executed).

[134] See Gorham v. State, 454 So.2d 556, 559 (Fla. 1984), cert. denied 469 U.S. 1181 (1985) (disapproving heinousness based partly on the victim's lack of resistance); Roberts v. State, 510 So.2d 885, 894 (Fla. 1987) (victim attempted to fend off blows); Floyd v. State, 497 So.2d 1211, 1214 (Fla. 1986) (victim had defensive stab wound); Wilson v.State, 493 So.2d 1019, 1023 (Fla. 1986) (victim attempted to fend off blows); Heiney v. State, 447 So.2d 210, 216 (Fla.), cert. denied 469 U.S. 920 (1984) (victim had defensive wounds).

[135] See Johnson v. State, 497 So.2d 863, 871 (Fla. 1986) (citing cases); Harvey v. State, 529 So.2d 1083, 1087 (Fla. 1988); Chandler v. State, 534 So.2d 701, 704 (Fla. 1988).

[136] See Scott v. State, 494 So.2d 1134, 1136 (Fla. 1986); Barclay v. State, 343 So.2d 1266, 1269 (Fla. 1977), aff'd 463 U.S. 939, 103 S.Ct. 3418 (1983), sentence vacated on other grounds 470 So.2d 691 (Fla. 1985).

[137] See Huff v. State, 495 So.2d 145, 153 (Fla. 1986).

Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 (1980); and Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988), petition for cert. filed, 57 U.S.L.W. 3655 (U.S. March 20, 1989) (No. 88-1553). No consistently applied, objective limits or guides can be found in the appellate decisions. The resulting vagueness violates the Eighth Amendment. Maynard v. Cartwright, 108 S.Ct. at 1859; Adamson, 865 F.2d at 1031. Without clear principles to explain a vaguely worded aggravator, courts cannot rationally review aggravator findings, the class of death-eligible murderers is not narrowed, and, most importantly, the judges and juries who must decide whether to condemn the defendant to death have no guidance in fulfilling their awesome responsibility.

(iv) Failing to instruct juries on the limited scope of an aggravator which could be applied to any murder injects complete arbitrariness into death sentences.

The Constitutions of the United States and Florida do not allow unreasoned responses to a crime to serve as the basis for decisions in death cases. Yet, a gut reaction is the sole basis which Florida's Standard Jury Instruction gives jurors to decide the heinous, atrocious or cruel aggravator. The instruction reads, in whole:

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

The Court has held that juries are not to be read the definitions of Dixon. See Pope v. State, 441 So.2d 1073, 1078 (Fla. 1984). These words, standing alone, provide no limit to the consideration of the aggravator because any first degree murder could reasonably be described as especially wicked, evil, atrocious or cruel. See Cartwright, 108 S.Ct. at 1859. The appellate decisions which purport to limit the aggravator are never communicated to the jury; this failure makes whatever guidance the appellate decisions provide irrelevant.

B. Florida's vague application of its premeditated aggravator fails to guide the sentencer, limit the class of the death-eligible, or provide a rational basis for review of death sentences because the premeditation aggravator cannot be meaningfully and consistently distinguished from the premeditation element of first degree murder.[138]

Premeditation under the murder statute is a fully formed, conscious purpose to kill which may be formed a moment before the act, but exists long

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[138] (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. §921.141(5)(i), Fla. Stat.

enough "to permit reflection as to the nature of the act to be committed and the probable result of that act." Wilson v. State, 493 So.2d 1019, 1021 (Fla. 1986). This Court has repeatedly held that the premeditation which must be found for the premeditation aggravator to apply exceeds the premeditation required for first degree murder. See Gorham v. State, 454 So.2d 556, 559 (Fla. 1984), cert. denied 469 U.S. 1181 (1985). However, cases applying the cold, calculated, and premeditated aggravator cannot consistently and reasonably be distinguished from the premeditation of first degree murder.

The statute on its face does not provide any obvious, objective guides to what murders are included within its reach. Assuming the phrase cold, calculated, and premeditated would be read together, it does not necessarily suggest a greater degree of premeditation than that involved in first degree murder. Premeditation for murder requires a purpose to kill with sufficient time to permit reflection of the act. Unless Florida requires some proof of actual reflection beyond the doing of the act and opportunity to reflect, premeditation for murder and the aggravator are identical insofar as any ascertainable evidence is concerned.

This Court has provided different definitions of heightened premeditation.[139] The aggravator:

> is reserved primarily for those murders which are characterized as execution or contract murders or witness-elimination murders. Bates v. State, 465 So.2d 490, 493 (Fla. 1985).

Floyd v. State, 497 So.2d 1211, 1214 (Fla. 1986). The Court has stated that heightened premeditation can be shown by:

> a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator.

Preston v. State, 444 So.2d 939, 946 (Fla. 1984); see Nibert v. State, 508 So.2d 1, 4 (Fla. 1987); Swafford v. State, 533 So.2d 270, 277 (Fla. 1988). But, the premeditation for first degree murder also requires time sufficient for reflection on the act. If the aggravator as applied provides no principle to distinguish a particularly lengthy or substantial period of reflection required to establish the heightened premeditation of the aggravator from the period

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[139] The court has defined without pretense of moral or legal justification as a form of rebuttal to premeditation, not a separate limitation See Banda v. State, 536 So.2d 221 (Fla. 1988).

allowing reflection required to establish premeditated murder, then this definition does not limit the aggravator any more than a conviction of premeditated murder does. This Court has not consistently made that distinction in practice.

The Court has recently announced it will require evidence of a careful plan or prearranged design to kill as a necessary element of the aggravator. See Rogers v. State, 511 So.2d 526, 533 (Fla.), cert. denied 108 S.Ct. 733 (1987). In Rogers, the Court receded from a broader use of the aggravator as applied in Herring v. State, 446 So.2d 1049 (Fla.), cert. denied 469 U.S. 989 (Fla. 1984). See Amoros v. State, 531 So.2d 1256, 1261 (Fla. 1988). But in Swafford v. State, 533 So.2d 270 (Fla. 1988), this Court readopted the Herring standard abandoned in Rogers. Swafford abandoned Roger's requirement of an actual plan or prearrangement. But see Schafer v. State, 537 So.2d 988 (Fla. 1989); (citing Rogers, not mentioning Swafford). The confusion in defining the aggravator reflects confusion in applying it.[140] At times, the Court will assume heightened premeditation even then the facts suggest no plan to murder at all.[141]

The question of whether proof of an intent to commit some crime suffices to prove heightened premeditation produces completely contrary results. A purpose to commit a crime standing alone i.e., without a plan to murder during the crime says little about even the simple premeditation required for first degree murder although that purpose would relate to a felony murder. In several cases, the facts revealed the defendant planned a crime different than the homicide for which he was convicted, but the Court held the premeditation

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[140] See generally J. Kennedy, Florida's "Cold, Calculated and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L.Rev. 47 (1987).

[141] In Mason v. State, 438 So.2d 374 (Fla. 1983), cert. denied 465 U.S. 1061 (1984), the victim's child testified she woke that night to see her mother being stabbed in bed. The Court wrote: "Nothing indicates she provoked the attack in any way or that appellant had any reason for committing the murder." Id. at 379. The opinion suggests Mason intended to rape the victim; the Court approved use of the evidence of a similar burglary in which the defendant raped the victim but did not kill her. Id. at 377. Despite evidence tending to show the killing was not planned, and no evidence suggesting it was planned, the Court approved application of the premeditation aggravator. Although the evidence suggests an opportunity for reflection, nothing suggests the defendant actually thought about murdering the victim. See also Scott v. State, 494 So.2d 1134, 1138 (Fla. 1986) (defendant did not make showing of pretense of justification).

aggravator applied.[142] Cases decided before Rogers also have held a plan to commit a crime cannot serve to establish the heightened premeditation aggravator.[143] Both before and after Rogers, this Court has not consistently followed any rule on whether heightened premeditation can be found by reference to planning for a crime differing from the homicide which actually took place.

Similarly inconsistent results appear in cases in which the premeditation occurs during the actual process of killing.[144] Cases in which the victim was kidnapped show more confusion over the meaning of heightened premeditation. The nearly identical cases of Preston v. State, 444 So.2d 939 (Fla. 1984) and Card v. State, 453 So.2d 17 (Fla.), cert. denied 469 U.S. 989 (1984) show the difficulty in applying the factor when the victim is kidnapped.[145]

Justice Ehrlich has written:

> We have, since McCray and Combs, gradually eroded the very significant distinction between simple premeditation and the heightened premeditation contemplated in section 921.145(5)(i)

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[142] Duest v. State, 462 So.2d 446, 450 (Fla. 1985); Melendez v. State, 498 So.2d 1258, 1261 (Fla. 1986); Provenzano v. State, 497 So.2d 1177, 1183 (Fla. 1986) cert. denied 107 S.Ct. 1912 (1987); Correll v. State, 523 So.2d 562 (Fla.), cert. denied 109 S.Ct. 183 (1988).

Yet, in Amoros v. State, 531 So.2d 1256, 1261 (Fla. 1988), the Court held evidence of a plan to kill cannot be transferred to the actual victim of the killing in applying the aggravator.

[143] See Hardwick v. State, 461 So.2d 79, 81 (Fla.), cert. denied 471 U.S. 1120 (1985); Gorham v. State, 454 So.2d 556 (Fla. 1984), cert. denied 469 U.S. 1181 (1985).

[144] In Herring, the Court held evidence that the defendant shot the victim during a holdup and then shot him again after the victim fell established heightened premeditation. 446 So.2d at 1057. In Rogers, the Court receded from Herring, but did not spell out exactly what was being receded from, only holding that heightened premeditation required a prearranged design or careful plan. During a bungled robbery attempt, Rogers ran down, shot, and killed the victim. This action did not show heightened premeditation. Rogers, 511 So.2d at 529, 533. However, in Swafford, citing Herring, the Court again approved of finding heightened premeditation because the defendant had to reload his gun while shooting the victim to death. Swafford, 533 So.2d at 277.

[145] In Preston, the victim was a convenience store clerk whom Preston drove one and one-half miles from the store, marched on foot 500 feet than then killed. This Court held heightened premeditation had not been proved. Preston, 444 So.2d at 946, 947; see also Bates v. State, 465 So.2d 490 (Fla. 1985), cert. denied 108 S.Ct. 212 (1987) (defendant forced women into woods, attempted to murder her, and then murdered her; HELD, no heightened premeditation). In Card, the defendant robbed a store, kidnapped the clerk and drove her eight miles. The Court found ample time during the drive sufficed for the defendant to reflect on murdering the victim and so upheld the aggravator. Card, 453 So.2d at 23-24; see Hamblen v. State, 527 So.2d 800 (Fla. 1988). These cases are also flatly contradictory. Sometimes opportunity to reflect is enough, other times not. No consistently applied limitations on the aggravator exist.

> (sic), Florida Statutes (1981). Loss of that distinction would bring into question the constitutionality of that aggravating factor and, perhaps, the constitutionality, as applied, of Florida's death penalty statute.

Herring v. State, 446 So.2d 1049, 1058 (Fla.) (Ehrlich, dissenting in part), cert. denied 469 U.S. 989 (1984).If CCP adds nothing to the jury finding of premeditated murder, then any premeditated murder could be found to involve heightened premeditation. Where an aggravating circumstance is so vague that it can be applied to almost any murder, it cannot guide the sentencer and allows imposition of the death penalty at the sentencer's caprice. Maynard v. Cartwright, 108 S.Ct. 1853 (1988). Where no consistently applied appellate principles appear, review by this Court cannot possibly cure sentencer error. The inconsistencies appearing in appellate review of the application of the premeditation aggravator show that consistency has not been achieved at either the trial or review stages. Moreover, Florida's juries are not given the benefit of the guidance which might be found in appellate cases since the juries are simply instructed in the vague terms of the statute. Fla.Std. Jury Instr. (Crim.) Sentencing Proceedings -- Capital Cases. Since these words are so vague as to be applicable to all premeditated murders, the instruction gives the jury no guidance and creates a sentencing system which does not impose death on the basis of reason, but rather the caprice of the sentencer.

The aggravator also violates the narrowing requirement of the Eighth Amendment. No objectively ascertainable narrowing of the class of death-eligible takes place as required by the Eighth Amendment under Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742 (1982). Since Florida also uses a felony murder aggravator which applies in felony murder cases, any first degree murder in Florida qualifies for a death sentence, making this error even more egregious.

> To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Zant, 462 U.S. at 876-877 (emphasis added).[146] Because Florida's aggravating

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[146] The case of Lowenfield v. Phelps, 108 S.Ct. 546 (1988) does not counsel a different result. The Supreme Court held irrelevant for Eighth Amendment purposes whether the narrowing was done in the guilt or penalty phase of the trial. Id. at 555. However, the class eligible for death under the Florida statute is much wider: any serious felony murderer or premeditated murderer might be executed. Lowenfield reaffirmed the need for narrowing requirements.

circumstances allows arbitrary imposition of the death penalty on a broad class, the statute violates the Eighth Amendment and Article I, Section 17 of the Florida Constitution.

c. The issue of vague aggravating circumstances was raised and denied below.

Counsel below moved to declare the death sentencing statute unconstitutional as vague and arbitrary as allowing a pattern of arbitrary and capricious sentencing. R 991, 997, 999. The trial court denied those motions. R 112, 113, 114, 115. These issues are properly before this Court.

c. SUBSECTIONS 921.141(2)(b) AND 921.141(3)(b), FLORIDA STATUTES (1987) DENY CAPITAL DEFENDANTS AN INDIVIDUALIZED SENTENCING DETERMINATION AND SO RESULT IN CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE FEDERAL CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

(i) Florida denies capital defendants an individualized sentencing determination when it forbids consideration of mitigating evidence not meeting a reasonably convincing standard of proof.

Florida requires jurors be 'reasonably convinced' of a mitigator's existence before weighing it. Fla.Std. Jury Instr. (Crim.) Penalty Proceedings -- Capital Cases see Floyd v. State, 497 So.2d 1211, 1216 (Fla. 1986). If the jury recommends death, the trial judge must make findings of fact under the same standard §921.141(3). The judge must first find if evidence supports mitigators, and then weigh only those mitigators 'found' against the aggravators. See Rogers v. State, 511 So.2d 526 (Fla. 1987); Lamb v. State, 532 So.2d 1051, 1054 (Fla. 1988). Thus, the trial judge cannot consider evidence unless it is factually supported under the reasonably convincing standard of proof. This Court has had little to say on the meaning of the phrase "reasonably convinced." Sentencing juries do not return special verdicts so their findings of fact cannot be reviewed. The Court has not discussed the standard in its reviews of trial court findings, leaving the decision whether to find evidence up to the discretion of the trial judge. See, e.g. Mills v. State, 462 So.2d 1075, 1081 (Fla.), cert. denied 473 U.S. 911 (1985); and Deaton v. State, 480 So.2d 1279 (Fla. 1989).

"[W]hether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." Sandstrom v. Montana, 442 U.S. 510, 514 (1979). The jury was told:

> 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.

R 910. The use of the word 'convinced' instructs the jury to disregard much of the evidence which the Supreme Court has recognized is vital for an individualized sentencing. 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), quoting Slomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th DCA 1983). Much of the evidence in mitigating a capital crime consists of the life history of the defendant. See Eddings v. Oklahoma, 455 U.S. 104, 115, (1982). The witnesses as to these matters 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 "convinced" that the testimony of family members establishes "a mitigating circumstance" restricts the defendant in presenting a case for life. The Eighth Amendment requires that a capital defendant receive an individualized sentencing hearing without restrictions on relevant mitigating evidence. See, e.g. Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc), petition for cert. filed, 57 U.S.L.W. 3655 (U.S. Mar. 20, 1989), struck down an Arizona statute because it forbade consideration of mitigating evidence unless the defendant proved by a preponderance of the evidence the existence of a mitigating factor.

Florida's statute, requiring a reasonably convincing standard of proof, is even more restrictive than the Arizona law struck in Adamson. Adamson teaches that even a preponderance standard violates the Eighth Amendment requirement of an individualized sentencing determination. Florida's higher standard of proof, one which encourages sentencers to ignore much of the most important mitigating evidence presented by capital defendants, creates an even greater inequity.

(ii) Florida denies capital defendants an individualized sentencing determination by imposing a presumption for death in the sentencing phase.

Florida's death penalty statute describes the jury's responsibility to weigh the aggravators and mitigators as:

> (b) whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and (c) Based

> on these considerations, whether the defendant should be sentenced to life imprisonment or death.

§921.141(2) (emphasis added). If the judge sentences a defendant to die, he must explain in writing "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." §921.141(3)(b), (emphasis added). This Court has described this weighing function in terms of a shifting burden of proof. First, the jury or judge must find aggravators to be established beyond a reasonable doubt. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Florida Statutes, Section 921.141(7), F.S.A.

Id. see Alford v. State, 307 So.2d 433, 444 (Fla. 1975); Jacobs v. State, 396 So.2d 1113, 1119 (Fla. 1981). This Court has often invoked this presumption for death in declaring that a judge's mistakes in finding aggravators were harmless where the trial court found no mitigators.[147] It has also cited the presumption for death in holding a death sentence proportional. See Jackson v. State, 502 So.2d 409, 413 (Fla. 1986), cert. denied 107 S.Ct. 3198 (1987). The Standard Jury Instructions thrice instruct the jury to impose death if it finds at least one aggravator unless the mitigators outweigh the aggravators. Fla.Std. Jury Instr. (Crim) Penalty Proceedings -- Capital Cases F.S. 921.141; Jackson v. Wainwright, 421 So.2d 1385, 1388-1389 (Fla. 1982), cert. denied 463 U.S. 1229 (1983). The statute's words, this Court's use of the presumption for death once aggravators are found, and the jury instructions stating the same all show that such a presumption does exist at the level of the sentencer in Florida.

A presumption for death in weighing aggravating and mitigating circumstances denies a capital defendant an individualized sentencing. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir.), cert. denied 108 S.Ct. 2005 (1988); Adamson, 865 F.2d at 1043. It also denies the defendant due process of law. Id.[148]

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[147] Cooper v. State, 492 So.2d 1059, 1063 (Fla. 1986), cert. denied 479 U.S. 1011 (1987); Blanco v. State, 452 So.2d 520, 526 (Fla. 1984), cert. denied 469 U.S. 1181 (1985); White v. State, 446 So.2d 1031, 1037 (Fla. 1984).

[148] The United States Supreme Court will consider a closely related issue in Blystone v. Pennsylvania, 57 U.S.L.W. 3635 (U.S. Mar. 27, 1989)(No. 88-6222) (order granting cert.).

Florida's presumption found its way into the jury instructions below, R 785, 907, 909, and the trial judge who imposed death used it in doing so. R 1107. Trial counsel moved the court to declare Section 921.141 unconstitutional because it created this presumption. R 997. The trial court denied the motion. R 997. This Court must reverse on this issue, to give Mr. Bruno an individualized sentence and provide due process of law.

C. APPELLANT'S SENTENCE ON COUNT II OF THE INDICTMENT MUST BE VACATED AND APPELLANT REMANDED FOR RESENTENCING SINCE NO GUIDELINES SCORESHEET WAS FILED WITH OR USED BY THE SENTENCING COURT.

Mr. Bruno was sentenced to life in prison on the robbery count. R 1107, 953. This was done without any record of a guidelines scoresheet being filed (See Vol. VI of record on appeal).[149]

Rule 3.701(d)(i) requires that one guideline scoresheet be utilized for each defendant covering all cases pending before the court for sentencing. The State Attorney will prepare the scoresheet and present it to defense counsel for review. The sentencing judge must approve all scoresheets. Lamb v. State, 532 So.2d 1051 (Fla. 1988). There is no record of such compliance with the rules here, so the sentence on Count II must be vacated and Appellant remanded for sentencing with a proper scoresheet.

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[149] Appellate counsel, at point 2(c) of his Motion for Order Requiring Lower Court to Locate or Reconstruct Missing Exhibits, requested that a scoresheet be supplied. An order granting that motion was entered by this Court May 31, 1988. Upon remand, the sentencing judge mentioned the scoresheet for Count II and asked the state attorney to supply it. (2nd Supp. Record 28). To this date no scoresheet has been supplied.

V. Conclusion

For the foregoing reasons, Mr. Bruno's convictions must be reversed, and his sentence of death vacated or reduced to life, and the life sentence for robbery must be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Deborah Guller, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida, this 14th day of September, 1989.

_____
Of Counsel